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# A TREATISE

ON THE

# LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH

ILLUSTRATIONS FROM AMERICAN AND OTHER FOREIGN  
LAWS.

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*From the Eighth English Edition.*

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BY

HIS HONOUR JUDGE PITT TAYLOR.

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VOL. I.

PART FIRST.

Longum iter est per præcepta,  
Breve et efficax per exempla —*SÆPICA.*

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PHILADELPHIA:  
THE BLACKSTONE PUBLISHING COMPANY  
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LTD  
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## PREFACE TO THE EIGHTH EDITION.

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IN the Preface to the Seventh Edition of my Treatise on Evidence I find the following remarks:—

“The labour I have bestowed on the work has been necessarily great, because the Judicature Acts of 1873 and 1875 have altered the law on so many subjects, and unsettled it to such an extent, that it has become extremely difficult, either to dovetail the old procedure or the old principles with the new, or to determine, in a cloud of cases, by what rules the practitioners and the suitors must henceforth be guided.

“We all know what is the best recipe for spoiling broth; and, possessing that culinary knowledge, we, perhaps, ought not to marvel, if a colossal scheme of law reform,—subjected in the first instance to the criticisms of a multitude of commissioners, (all able and learned men, and some few just a trifle opinative,) and then entrusted, in succession, to two distinguished Lord Chancellors to obtain for it the piecemeal sanction of the Legislature,—should have failed to achieve that success which its too sanguine originators anticipated from its adoption.

“Regarded in a practical light, either far too much or far too little has been effected by the measure. Commencing in wrangles and progressing in compromises, it has naturally ended in a muddle. The fusion of Law and Equity,—which was to overthrow such a phalanx of abuses, and to frustrate so many knavish tricks,—has resulted, not only in confusion, but, to use the vigorous language of our blind bard, in ‘confusion worse confounded.’ It is a humiliating confession—but it is unquestionably true.”

If to the difficulties with which I had *then* to contend,—and the language just cited is in no way overcharged,—be added those which have since been strewn in my path by the peculiar embrangement of recent Legislation, I can only marvel at my own intrepidity in venturing to prepare for the press an Eighth Edition.

In this Edition,—besides “booking up” in their proper places all the decisions of the Courts which, in my judgment, are calculated to throw any substantial light on the New Procedure,—I have done my utmost endeavour to weld into one consistent whole the incongruous provisions relating to Evidence, which are to be found scattered without method or system over the varied enactments of the New Bankruptcy Act, the Army Act, the New Code respecting Bills of Exchange, the Factory and Workshop Act, the Contagious Diseases Animals Act, the Municipal Corporation Acts, the Corrupt Practices Acts, the Bills of Sale Acts, the Employers’ Liability Act, the Summary Jurisdiction Acts, the Bankers’ Books Evidence Act, the Married Women’s Property Act, the New Patent Law, and last, though not least, the New Rules of the Supreme Court.

That I have succeeded in making *all* crooked places straight, and *all* rough places plain, I cannot venture, in my most sanguine mood, to affirm; but thus much I can honestly assert, that I have spared neither labour,



nor time, nor energy, in attempting to make my work both worthy of its former character, and of real practical use to the Profession.

In now finally laying down my pen, so far at least as this Treatise is concerned, I must be permitted,—as on a former occasion,—to adopt the sentiment of a Scotch Divine, and earnestly to repeat after him,—

“Unthought of by man in rewards or in praises,  
May I be remembered by what I have done.”

J. PITT TAYLOR.

58, ECCLESTON SQUARE,  
1st Dec., 1884.

EXTRACTS FROM THE

PREFACE TO THE FIRST EDITION.

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THE following Work is founded on "Dr. Greenleaf's American Treatise on the Law of Evidence." Indeed, when in July, 1843, my attention was first especially drawn to the subject of Evidence, with a view to publication, I undertook to discharge the duties of an editor only, and it was not until I had been engaged for many months in that undertaking that I finally determined to abandon it, and to submit to the public a treatise of my own. In taking this step, I had no idle hope of being able to produce a book, which, regarded as an exposition of general principles, should surpass, or even equal, that written by the learned American Professor; but I thought that, by citing more fully the leading decisions of our own Courts, and by introducing such portions of our Statute Law as related to the subject of Evidence, I might possibly compile a work of more practical utility to the English and Irish lawyer. To have introduced this new matter, in the shape of notes to Dr. Greenleaf's Treatise, would have been highly inconvenient; to have interwoven it with his text, and still to have called the work by his name, would have been alike unjust to him and to myself; and, consequently, it appeared to me, that the only alternative left was to publish a work in my own name, for the errors of which I should be alone responsible.

I have still, however, availed myself very largely of Dr. Greenleaf's labours, having adopted, with but few alterations, his excellent general arrangement, having followed to a considerable extent the course even of his sections, and having borrowed many pages of his terse and luminous writing. My object has been to afford to the profession really useful and accurate information; and whether that information were conveyed in my own or in another's language, has been to me, as it will doubtless be to my readers, a matter of indifference.

From the American decisions cited by Dr. Greenleaf, I have made a selection, having referred to such, as, in my judgment, either afforded favourable illustrations of doubtful points of law, or laid down rules superior to those adopted in our own Courts.

With the view of rendering my work useful to the practitioner in Ireland, I have noticed most of the leading decisions of the Four Courts on the Law of Evidence, and have referred to many Irish Statutes on the same subject.

In stating what the law is, I have not been unmindful of what, in my humble opinion, it ought to be; and I have therefore ventured from time to time, to point out briefly such alterations in the law as I conceive would effect material amendments. The Law-Reformer, by referring to the Index, Title, "Suggestions for Amending the Law of Evidence," will find what I have done on this head.

The book contains no chapter on the Law of Stamps. This omission might perhaps be justified by simply referring to the able works of Messrs. Phillipps and Starkie, in the former of which the

subject is not treated, while in the latter, it occupies a very subordinate place in the third volume. But the reasons which chiefly influenced me in deciding to reject the Law of Stamps, were, 1st, that it has been already discussed at large in several distinct treatises ; 2nd, that any exposition of it, to be of practical value, must have added much to the bulk of the work, and consequently to its price ; 3rd, that it would have delayed the publication for many months ; 4th, that this branch of the law will probably ere long undergo very extensive changes; and last,—though I confess not least,—that it is one of the most repulsive subjects which could be selected by an author for discussion.

In a work of this magnitude, treating as it does of a fluctuating branch of the law, I am well aware that many mistakes must have occurred ; for these, my only apology is, that I have spared no labour to avoid them. The language of St. Augustine is an author's best consolation:—"Illi in vos sæviant, qui nesciunt cum quo labore verum inveniatur, et quàm difficile caveantur errores."

J. PITT TAYLOR.

2, HARCOURT BUILDINGS, TEMPLE,  
10th February, 1848.

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# A LIST

OF

## The Abbreviations used in this Treatise.

THE TOGETHER WITH A STATEMENT OF

EDITIONS OF THE PRINCIPAL ELEMENTARY WORKS CITED.

NOTE.—The letters A. B. C. D. appended to the American Reports, denote the relative estimation in which those Reports are held by the profession in general, out of the particular State where the decisions were pronounced: A. marking the highest degree of excellence. A very eminent American jurist has kindly furnished the Author with this guide.

### ABBREVIATIONS.

### NAME OF WORK, ETC.

A. & E. . . . .	Adolphus & Ellis's Reports, King's Bench. 12 vols.
Aberc. on Intell. } Pow. . . . . }	Abercrombie on the Intellectual Powers. 6th ed. Edinburgh, 1836.
Adam's Ant. . . . .	Adam's Roman Antiquities.
Addia. . . . .	Addison's Reports, Pennsylvania, 1791—1799. 1 vol. (C.)
Add. . . . .	Addams' Ecclesiastical Reports. 3 vols.
Aik. . . . .	Aiken's Reports, Vermont. 1826—1827. 2 vols. (B.)
A. K. Marsh. . . . .	A. K. Marshall's Rep., Kentucky. 1817—1821. 3 vols. (D.)
Alc. & Nap. . . . .	Alcock & Napier's Reports, King's Bench, Ireland. 1 vol.
Alcia. de Præs. . . . .	Alciatus de Præsumptione. Alciati Opera, Basileæ. 1852. 4 tom. fol.
Alison, Cr. L. . . . .	Alison's Principles of the Criminal Law of Scotland.
Alison, Pract. of } Cr. L. . . . . }	Alison's Practice of the Criminal Law of Scotland.
Am. Ed. . . . .	American edition.
Am. Jur. . . . .	American Jurist. Boston.
Amb. . . . .	Ambler's Reports, Chancery. 2 vols.
And. . . . .	Anderson's Reports, Common Pleas. 1 vol.
Andr. . . . .	Andrew's Reports, King's Bench. 1 vol.
Anstr. . . . .	Anstruther's Reports, Exchequer. 3 vols.
Anthon, . . . . .	Anthon's Nisi Pr. Rep., New York. 1808—1818. 1 vol. (D.)
Applet. . . . .	Appleton's Reports, Maine, from 1841. 1 vol. (C.)
Arch. Cr. Pl. . . . .	Archbold's Criminal Pleading. 16th ed., 1867.
Arm. M. & O. . . . .	Armstrong, Macartney & Ogle's Rep., Nisi Pr. Irel. 1 vol.
Arm. & T. . . . .	Armstrong & Trevor's Rep. of R. v. O'Connell, Dub., 1844.
Atk. . . . .	Atkyns's Reports, Chancery. 3 vols.
Att. Gen. . . . .	Attorney-General.
Ayliffe Par. . . . .	Ayliffe's Paregon, 2nd edition, 1734.
B. & A. . . . .	Barnewall & Alderson's Reports, King's Bench. 5 vols.
B. & Ad. . . . .	Barnewall & Adolphus' Reports, King's Bench. 5 vols.
B. & B. . . . .	Broderip & Bingham's Reports, Common Pleas. 3 vols.
B. & C. . . . .	Barnewall & Cresswell's Reports, King's Bench. 10 vols.

ABBREVIATIONS.	NAME OF WORKS, ETC.
B. & Lush. Adm. . . . .	Browning and Lushington's Admiralty Reports. 1 vol.
B. & P. . . . .	Bosanquet & Puller's Reports, Common Pleas. 3 vols.
B. & S. . . . .	Best & Smith's Queen's Bench Reports. 10 vols.
Bac. Ab. . . . .	Bacon's Abridgment.
Bail. . . . .	Bailey's Reports, South Carolina, 1828—1832. 2 vols. (B.)
Bail. Ct. Cas. . . . .	Lowndes & Maxwell's Bail Court Cases, 1852. 1 vol.
Ball & B. . . . .	Ball & Beatty's Reports, Chancery, Ireland. 2 vols.
Barnes, . . . . .	Barnes's Notes of Practice Cases in Common Pleas.
Batty, . . . . .	Batty's Reports, King's Bench, Ireland. 1 vol.
Bay, . . . . .	Bay's Reports, South Carolina, 1783—1804. 2 vols. (B.C.)
Bayl. Bills. . . . .	Bayley, J., on Bills of Exchange. 6th ed. London, 1849.
Beav. . . . .	Beavan's Reports, Rolls Court. 36 vols.
Bell, C. C. . . . .	Bell's Crown Cases Reserved, 1859. 1 vol.
Bell, Dig. . . . .	Bell's Digest of the Laws of Scotland.
Benth. Ev. . . . .	Bentham's Rationale of Jud. Evid. 5 vols. Lond., 1837.
Best, Ev. . . . .	Best's Principles of Law of Evid. London. 3rd ed. 1860.
Bibb, . . . . .	Bibb's Reports, Kentucky, 1808—1817. 4 vols. (D.)
Bing. . . . .	Bingham's Reports, Common Pleas. 10 vols.
Bing. N. S. . . . .	Bingham's Reports, New Series, Common Pleas. 6 vols.
Binn. . . . .	Binney's Reports, Pennsylvania, 1799—1814. 6 vols. (A.)
Bp. of Tasm. Lect. } on Chr. Cat. }	Bishop of Tasmania's Lectures on the Christian Chateicism.
Bl. Com. . . . .	Blackstone's Commentaries.
H. Bl. . . . .	Henry Blackstone's Reports, Common Pleas. 2 vols.
W. Bl. . . . .	Sir William Blackstone's Reports (K. B. & C. P.). 2 vols.
Bland, Ch. . . . .	Bland's Chancery Rep., Maryland, 1811—1830. 2 vols. (C.)
Blackf. . . . .	Blackford's Reports, Indiana, 1817—1838. 4 vols. (C.D.)
Bligh, . . . . .	Bligh's Reports, House of Lords. 4 vols.
Bligh, N. S. . . . .	Bligh's Reports, New Series, House of Lords. 11 vols.
B. N. P. . . . .	Buller's Law of Nisi Prius.
Bott, . . . . .	Bott's Poor Laws.
Br. C. C. . . . .	Brown's Chancery Cases. 4 vols.
Br. P. C. . . . .	Brown's Parliamentary Cases. 8 vols.
Bridg. . . . .	Sir O. Bridgman's Judgments in Common Pleas. 1 vol.
Bro. Abr. . . . .	Brooke's Abridgment.
Broom, Max. . . . .	Broom's Legal Maxims. 3rd ed. London, 1858.
Browne, . . . . .	Browne's Reports, Pennsylvania, 1806—1814. 2 vols. (C.)
Brownl. . . . .	Brownlow's Reports, Common Pleas. 1 vol.
Buck, . . . . .	Buck's Reports in cases of Bankruptcy. 1 vol.
Bulst. . . . .	Bulstrode's Reports, King's Bench. 1 vol.
Bunb. . . . .	Bunbury's Reports, Exchequer. 1 vol.
Burge, Com. on } Col. & For. L. }	Burge's Commentaries on Colonial and Foreign Laws. 4 vols. London, 1838.
Burn, Ec. L. . . . .	Burn's Ecclesiastical Law. 9th ed. London, 1842.
Burn, Just. . . . .	Burn's Justice of the Peace, by Chitty. 29th ed. 1845.
Burnet, Cr. L. . . . .	Burnet on Criminal Law of Scotland.
Burr. . . . .	Burrow's Reports, King's Bench. 5 vols.
Burr. S. C. . . . .	Burrow's Settlement Cases, King's Bench. 1 vol.
Byles, Bills, . . . . .	Byles, J., on Bills of Exchange. 8th ed. London, 1862.
Bynk. Obs. Jur. } Rom. }	Bynkershoek, Libri Observationum Juris Romani.
C. & J. . . . .	Crompton & Jervis's Reports, Exchequer. 2 vols.
C. & Kir. . . . .	Carrington & Kirwan's Nisi Prius Reports. 3 vols.
C. & M. . . . .	Crompton & Meeson's Reports, Exchequer. 2 vols.
C. M. & R. . . . .	Crompton, Meeson, and Roscoe's Rep., Exchequer. 2 vols.
C. & Marsh. . . . .	Carrington & Marshman's Nisi Prius Reports. 1 vol.
C. & P. . . . .	Carrington & Payne's Nisi Prius Reports. 9 vols.
Cab. & El. . . . .	Cahabé & Ellis' Nisi Prius Reports, 1883, 1884.
Caines, . . . . .	Caines's Reports, New York, 1803—1805. 3 vols. (A.)

ABBREVIATIONS.	NAME OF WORK, ETC.
Cald . . . . .	Caldecott's Reports of Settlement Cases. 1 vol.
Calv. Lex . . . . .	Calvini Lexicon Juridicum Juris Cæsarii. Gen., 1645, fol.
Camp . . . . .	Campbell's Nisi Prius Reports. 4 vols.
Canc. Leg. barb. } ant . . . . . }	Canciani, Leges barbarorum antiquæ. Venetiis, 1781—1785. 5 vols. fol.
Carpz. Pract. } Rer. Cr . . . . . }	Carpzovii, Practicæ Rerum Criminalium. Francof. ad Mænum, 1758. 3 vols. fol.
Carr. Cr. L . . . . .	Carrington's Supplement of Treatises on Criminal Law.
Carth . . . . .	Carthew's Reports, King's Bench. 1 vol.
Cas. temp. Hard. . . . .	Cases in the time of Lord Hardwicke. 1 vol.
Cas. temp. Lee, . . . . .	Ecclesiastical Reports in the time of Sir G. Lee. 2 vols.
Channing, . . . . .	Channing's Works. 5 vols. 3rd edition. Glasgow, 1840.
Chit. Bills . . . . .	Chitty on Bills of Exchange. 9th edition. London, 1840.
Chit. Cr. L . . . . .	Chitty's Treatise on Criminal Law. 2nd ed. London, 1826.
Chit. Forms, . . . . .	Chitty's Forms of Practical Proceedings in Common Law Courts. 6th ed. London, 1847.
Chit. Gen. Pract. . . . .	Chitty's General Practice.
Chit. on Pl. . . . .	Chitty Senior, on Pleading, 7th ed. London, 1844.
Chit. R. . . . .	Chitty's Reports, King's Bench. 2 vols.
Cic. Fam. Ep. . . . .	Ciceronis Familiæ Epistolæ.
City Hall Rec. . . . .	New York Recorder, containing Reports of Cases in City Courts from 1816 to 1821. 6 vols.
Cl. & Fin. . . . .	Clark & Finnelly's Reports, House of Lords. 12 vols.
Co. . . . .	Lord Coke's Reports. London, 1826. 6 vols.
Co. Lit. . . . .	Coke on Littleton.
Cock. & R. . . . .	Cockburn & Rowe's Election Cases. 1 vol.
Cod. Lib. . . . .	Codex Theodosianus, Jacobi Gothofredi.
Code de Proc. Civ. . . . .	Code Napoleon de Procedure Civile.
Coll . . . . .	Collyer's Chancery Reports. 2 vols.
Com . . . . .	Commonwealth.
Com. B. . . . .	Manning, Granger, & Scott's Common Bench Rep. 18 vols.
Com. B., N. S. . . . .	New Series of Common Bench Rep. by John Scott. 20 vols.
Com. Di. . . . .	Comyn's Digest.
Com. J. . . . .	Journals of the House of Commons.
Com. Rep. . . . .	Comyn's Reports. All the Common Law Courts. 2 vols.
Comb. . . . .	Comberbach's Reports King's Bench. 1 vol.
Conklin's Pr. . . . .	Conklin's Practice of Cts. of United States, New York, 1842.
Conn. . . . .	Connecticut Reports, by T. Day, 1814—1848. 15 vols. (B.)
Cons. Ord. Ch. 1860 . . . . .	Consolidated General Orders of the Ct. of Chancery, 1860.
Cons. R. . . . .	Haggard's Consistory Reports. 2 vols.
Const. R. . . . .	Constitutional Rep., S. Carolina, 1812—1816. 2 vols. (B.C.)
Const. & Can. . . . .	Constitutions and Canons Ecclesiastical.
Const. U. S. Amend. . . . .	Amended Constitution of the United States.
Cooke & Alc. . . . .	Cooke & Alcock's Rep., King's Bench, Ireland. 1 vol.
Cooke, . . . . .	Cooke's Reports, Tennessee, 1811—1814. 1 vol. (D.)
Coop. . . . .	Charles Purton Cooper's Cases in Chancery. 1 vol.
Cor. . . . .	St. Paul's Epistle to the Corinthians.
Corner, Cr. Pr. . . . .	Corner's Crown Practice in Queen's Bench. London, 1814.
Cowell's Ind. App. . . . .	Cowell's Indian Appeals.
Cowen, . . . . .	Cowen's Reports, New York, 1823—1828. 9 vols. (A.)
Cowp. . . . .	Cowper's Reports, King's Bench. 2 vols.
Cox, Ch. R. . . . .	Cox's Reports, Chancery. 2 vols.
Cox, . . . . .	Cox's Criminal Law Cases. 13 vols.
Coxe, . . . . .	Coxe's Reports, New Jersey, 1790—1795. 1 vol. (C.)
Cr. & Ph . . . . .	Craig & Phillips' Reports, Chancery. 1 vol.
Cranch, . . . . .	Cranch's Rep., Sup. Ct. of U. S., 1800—1815. 9 vols. (A.)
Crawf. & D., Abr. C. . . . .	Crawford & Dix's Abridged Cases in Ireland. 1 vol.
Crawf. & D., C. C. . . . .	Crawford & Dix, Irish Circuit Reports. 3 vols.
Cro. Car. . . . .	Croke's Reports in the Reign of King Charles I.

ABBREVIATIONS.	NAME OF WORK, ETC.
Cro. El. . . . .	Croke's Reports in the Reign of Queen Elizabeth.
Cro. Jac. . . . .	Croke's Reports in the Reign of King James.
Cruise, Dign. . . . .	Cruise on Dignities or Titles of Honour.
Cujac. Op. Posth. . . . .	Cujacii Opera Posthuma.
Curt . . . . .	Curteis' Ecclesiastical Reports. 3 vols.
Cush. . . . .	Cushing's Rep. Supreme Court of Massachusetts. 9 vols.
Cy. Ct. R. O. & F. . . . .	County Court Rules, Orders and Forms, 1868.
Cy. Ct. R. 1875 . . . . .	Consol. County Court Orders, Rules, and Forms, 1875.
D. & M. . . . .	Davison & Merivale's Reports, Queen's Bench. 1 vol.
D. & R. . . . .	Dowling & Ryland's Reports, King's Bench. 9 vols.
D. & R. Mag. Ca. . . . .	Dowling & Ryland's Magistrates' Cases. 4 vols.
D & R., N. P. C. . . . .	Dowling & Ryland's Nisi Prius Cases. 1 vol.
Dalison, . . . . .	Benloe & Dalison's Reports, Com. Pl. 1 vol.
Dall . . . . .	Dallas's Reports. Supreme Courts of United States, and Pennsylvania, 1790—1806. 4 vols. (A.)
Dalt . . . . .	Dalton's Country Justice, Ed., 1697.
Dan. Ch. Pr. . . . .	Daniell's Chancery Practice. 4th ed., by Messrs. Field, Dunn, & Biddle. London. 1865—1867.
Dane, Abr. . . . .	Dane's Abridgment, United States.
Danty, . . . . .	Traité de la Preuve. Paris, 1697, 4to.
Davidson, Conc. Pr. . . . .	Davidson's Concise Precedents of Conveyancing.
Day, . . . . .	Day's Reports, Connecticut, 1802—1810. 5 vols. (B.)
Dea. & C. . . . .	Deacon & Chitty's Reports, Bankruptcy. 4 vols.
Dea. & Sw. Ec. R. . . . .	Deane & Swabey's Ecclesiastical Rep. London. 1 vol.
Deane, Ec. R. . . . .	Deane's Ecclesiastical Reports. London, 1856. 1 vol.
Deane, Verm. R. . . . .	Deane's Reports. Supreme Court of Vermont. 3 vols.
Dear. & Bell, . . . . .	Dearsley & Bell's Crown Cases Reserved. 1 vol.
Dec. Greg. . . . .	Decretals of Pope Gregory IX.
De Gex, F. & J. . . . .	De Gex, Fisher & Jones, Chancery Appeals. 4 vols.
De Gex & J. . . . .	De Gex & Jones, Chancery Appeals, 1857. 4 vols.
De Gex, J. & S. . . . .	De Gex, Jones, & Smith, Chancery Appeals. 4 vols.
De Gex, M. & G. . . . .	De Gex, Macnaghten, & Gordon, Chancery Appeals, 8 vols.
De Gex & Sm. . . . .	De Gex & Smale's Rep., V.-C. Knight Bruce's Ct. 5 vols.
Den. . . . .	Denison's Crown Cases Reserved. 2 vols.
Dev. . . . .	Devereux's Rep., North Carolina, 1826—1834. 4 vols. (B.)
Dev. & B. . . . .	Devereux & Battle's Rep., North Carolina, 1834—1840. 4 vols. (B.)
Dick . . . . .	Dickens's Reports, Chancery. 2 vols.
Dick. Quar. Sess. . . . .	Dickinson's Quarter Sessions. 6th ed. London, 1846.
Dickson, Ev. . . . .	Dickson on Evidence in Scotland. 2 vols. Edinburgh, 1855.
Dig. Lib. . . . .	Digests of Civil Law.
Doct. & Stu. . . . .	Doctor and Student.
Dods. Adm. . . . .	Dodson's Reports, Court of Admiralty. 2 vols.
Dom. Proc. . . . .	House of Lords.
Doug. . . . .	Douglas's Reports, King's Bench, 4 vols.
Dow, . . . . .	Dow's Reports, House of Lords, 6 vols.
Dowl. . . . .	Dowling's Practice Cases, Old Ser. Com. Law Cts. 9 vols.
Dowl. N. S. . . . .	Dowling's Practice Cases, New Series. The same, 2 vols.
Dowl. & L. . . . .	Dowling & Lowndes's Practice Cases. The same, 7 vols.
Dr. & St. . . . .	Doctor and Student.
Drew. . . . .	Drewry's Rep. of Decisions by Kindersley, V.-C., 4 vols.
Drew. & Sm. . . . .	Drewry & Smale's Rep. in same court, 2 vols.
Drury, Ch. R. . . . .	Drury's Irish Chancery Rep., temp. Sugden, Ch. 1 vol.
Drury & Warren. . . . .	Drury & Warren's Reports, Chancery, Ireland, 4 vols.
Dyer, . . . . .	Dyer's Reports, King's Bench. 3 vols.
E. & B. . . . .	Ellis & Blackburn's Queen's Bench Reports, 8 vols.
E. B. & E. . . . .	Ellis, Blackburn, & Ellis's Queen's Bench Rep., 1 vol.
E. & E. . . . .	Ellis & Ellis's Queen's Bench Reports, 3 vols.
Eag. & Y. . . . .	Eagle & Younge's Reports of Tithe Cases. 4 vols.

ABBREVIATIONS.	NAME OF WORK, ETC.
East, . . . . .	East's Reports, King's Bench. 16 vols.
East, P. C. . . . .	East's Pleas of the Crown.
Ec. & Mar. Cas. . . . .	Notes of Cases in Ecclesl. & Maritime Cts. Lond. 7 vols.
Edinb. Rev. . . . .	Edinburg Review.
Eq. Cas. Ab. . . . .	Equity Cases Abridged. 2 vols.
Ersk. Inst. . . . .	Erskine's Institutes of the law of Scotland.
Esp. . . . .	Espinasse's Nisi Prius Reports. 6 vols.
Everh. Conc. . . . .	Everhardi Concilia. Antwerp, 1643, fol.
Ex. R. . . . .	Exch. Rep., by Welsby, Hurlestons, & Gordon. 11 vols.
Fairf. . . . .	Fairfield's Reports, Maine, 1833—1835. 3 vols. (B.)
Farin. Op. . . . .	Farinacii Opera. Francof. ad Mœnum, 1684. 4 vols. fol.
Ff. . . . .	Pandecta Juris Civilis.
Fitzg. . . . .	Fitzgibbon's Reports. All the Courts. 1 vol.
Forrest, . . . . .	Forrest's Reports, Exchequer. 1 vol.
Post. C. L. . . . .	Sir M. Foster's Crown Law, 3rd ed., 1792.
Post. & Fin. . . . .	Foster & Finlason's Nisi Prius Reports. 4 vols.
Fox & Sm. . . . .	Fox & Smith's Reports, King's Bench, Ireland. 2 vols.
Freem. . . . .	Freeman's Reports. 1 vol.
G. & D. . . . .	Gale & Davison's Reports, Queen's Bench. 3 vols.
Gale, . . . . .	Gale's Reports, Exchequer.
Gall. . . . .	Gallison's Reports, United States, 1st Circuit Court, 1812—1815. 2 vols. (A.) Judge Story's Decisions.
Gamb. Guide, . . . . .	Gambier's Guide to the Study of Moral Evidence.
Gibson, Cod. . . . .	Gibson's Codex Juris Ecclesiastici Anglicani.
Giff. . . . .	Giffard's Reports, V.-C. Stuart's Court. 4 vols.
Gilb. Eq. R. . . . .	Gilbert's Equity Reports. 1 vol.
Gilb. Ev. . . . .	Gilbert on Evidence, by Lofft.
Gill. & J. . . . .	Gill & Johnson's Rep., Maryland, 1829—1840. 10 vols. (B.)
Glassf. Ev. . . . .	Glassford on Evidence, Edinburgh, 1820.
Godb. . . . .	Godbolt's Reports. 1 vol.
Gow, . . . . .	Gow's Nisi Prius Reports. 1 vol.
Gr. Ev. . . . .	Greenleaf on Evidence.
Gray, . . . . .	Gray's Reports, Supreme Court of Massachusetts. 2 vols.
Greenl. . . . .	Greenleaf's Reports, Maine, 1820—1832. 9 vols. (B.)
Greenl. on Test. } of Evang. . . . . }	Dr. Greenleaf on the testimony of the Evangelists, 2nd ed., London, 1847.
Gresl. Ev. . . . .	Gresley on Evidence in Courts of Chancery, paging of 1st ed. retained in margin of 2nd ed., 1847, London.
Gwill. . . . .	Gwillim's Reports of Statutes and Cases on Tithes.
H. Bl. . . . .	Henry Blackstone's Reports, Common Pleas. 2 vols.
H. & C. . . . .	Hurlestons & Coltman's Reports, Exchequer. 4 vols.
H. of L. Cas. . . . .	House of Lord's Cases, by Clark. 11 vols.
H. & N. . . . .	Hurlestons & Norman's Reports, Exchequer. 7 vols.
H. & R. . . . .	Harrison & Rutherford's Rep., Common Pleas. 1 vol.
Hagg. Cons. . . . .	Haggard's Consistory Reports. 2 vols.
Hagg. Ec. R. . . . .	Haggard's Ecclesiastical Reports. 4 vols.
Hale, . . . . .	Lord Hale's Pleas of the Crown.
Hale de Jur. Mar. . . . .	Lord Hale's Treatise de Jure Maris.
Hall & T. . . . .	Hall and Twell's Reports in Chancery. 2 vols.
Halst. . . . .	Halstead's Reports, New Jersey, 1821—1831. 7 vols. (C.)
Har. & G. . . . .	Harris & Gill's Rep., Maryland, 1826—1829. 2 vols. (B.)
Har. & M'Hen. . . . .	Harris & M'Henry's Rep., Maryland, 1790—1799. 4 vols. (D.)
Har. & W. . . . .	Harrison & Wollaston's Reports, King's Bench. 2 vols.
Hardin, . . . . .	Hardin's Reports, Kentucky, 1805—1808. 1 vol. (D.)
Hardr. . . . .	Hardres's Reports, Exchequer. 1 vol.
Hare, . . . . .	Hare's Rep. V.-Cs. Wigram & Turner's Cts. 11 vols.
Harg. L. Tracts, . . . . .	Hargrave's Law Tracts.
Harg. St. Tr. . . . .	Hargrave's State Trials. 11 vols.

ABBREVIATIONS.	NAME OF WORK, ETC.
Harr. & J. . . . .	Harris & Johnson's Reports, Maryland, 1800—1826. 7 vols. (B.)
Hawk. . . . .	Hawkin's Pleas of the Crown.
Hawks, . . . . .	Hawks' Reports, North Carolina, 1820—1826. 4 vols. (C.)
Hayes, . . . . .	Hayes' Reports, Exchequer, Ireland. 1 vol.
Hayes & Jon. . . . .	Hayes & Jones' Reports, Exchequer, Ireland. 1 vol.
Hayw. . . . .	Haywood's Reports, North Carolina, 1789—1806. (C.)
Hein. ad Pand. . . . .	Heineccius ad Pandectas. 5th tom. of his Works.
Hem. & M. . . . .	Hemming & Miller's Rep. in V.-C. Wood's Court. 2 vols.
Hen. & Munf. . . . .	Henning & Munford's Rep., Virginia, 1806—1809. 4 vols. (C.)
Hertius de Coll. Leg.	Hertius de Collisione Legum.
Hill, S. Car. R. . . . .	Hill's Reports, South Carolina, 1833—1835. 2 vols. (B.C.)
Hill, N. Y. R. . . . .	Hill's Reports, New York, 1841—1842. 3 vols. (B.)
Hob. . . . .	Hobart's Reports, King's Bench. 1 vol.
Hoffman on Leg. } Study, . . . . . }	Hoffman's Course of Legal Study, 2nd ed., 1836.
Holt, . . . . .	Lord Holt's Reports. 1 vol.
Holt, N. P. R. . . . .	Holt's Nisi Prius Reports. 1 vol.
Hop. & Colt. . . . .	Hopwood & Coltman's Registration Cases. 2 vols.
How. St. Tr. . . . .	Howell's State Trials. 34 vols.
Howard, S. Ct. R. . . . .	Howard's Rep., United States, Sup. Ct., from 1843. (A.)
Hubb. Ev. of Suc. . . . .	Hubback on Evidence of Succession, London, 1844.
Hume, Com. . . . .	Hume's Commentaries on Criminal Law of Scotland.
Humph. . . . .	Humphrey's Reports, Tennessee, 1839—1841. 2 vols. (D.)
Hutt. . . . .	Hutton's Reports, Common Pleas. 1 vol.
Inst. . . . .	Coke's Institutes.
I. R., C. L. . . . .	The Irish Reports, Common Law Series, Dublin, 1867—1878. 11 vols.
I. R., Eq. . . . .	The Irish Reports, Equity Series, Dublin, 1867—1878. 11 vols.
Ir. . . . .	Irish.
Ir. Cir. R. . . . .	Irish Circuit Reports. 1 vol.
Ir. Eq. R. . . . .	Irish Equity Reports. 13 vols.
Ir. Eq. R., N. S. . . . .	Irish Chancery Reports, New Series, 1850. 17 vols.
Ir. Law R. . . . .	Irish Law Reports. 13 vols.
Ir. Law R., N. S. . . . .	Irish Common Law Reports, New Series, 1850. 17 vols.
Iredell, . . . . .	Iredell's Reports, North Carolina, 1840—1841. 1 vol. (C.)
J. J. Marsh. . . . .	J. J. Marshall's Rep., Kentucky, 1829—1832. 7 vols. (D.)
J. Kel. . . . .	Sir John Kelynge's Reports, King's Bench. 1 vol.
Jac. . . . .	Jacob's Reports, Chancery. 1 vol.
Jac. & W. . . . .	Jacob & Walker's Reports, Chancery. 2 vols.
Jacobsen's Sea L. . . . .	Jacobsen's Sea Laws.
Jebb, C. C. . . . .	Jebb's Crown Cases Reserved, Ireland. 1 vol.
Jebb & B. . . . .	Jebb & Bourke's Rep., Queen's Bench, Ireland. 1 vol.
Jebb & Sy. . . . .	Jebb & Symes' Rep., Queen's Bench, Ireland. 2 vols.
Johns. . . . .	Johnson's Reports, New York, 1806—1823. 20 vols. (A.)
Johns. Ch. R. . . . .	Johnson's Chan. Rep., New York, 1814—1823. 7 vols. (A.)
Johns. & Hem. . . . .	Johnson & Hemming's Rep. in Ct. of Wood, V.-C. 2 vols.
Jones, . . . . .	Jones' Exchequer Reports, Ireland. 2 vols.
T. Jones, . . . . .	Sir Thomas Jones' Reports. 1 vol.
W. Jon. . . . .	Sir William Jones' Reports. 1 vol.
Jones & Lat. . . . .	Jones & Latouche's Rep., Chancery, Ireland. 3 vols.
Joy on Conf. . . . .	Joy on Confession in Criminal Cases, Dublin, 1842.
Jur. . . . .	Jurist Reports. All the Courts. 31 vols.
Jur., N. S. . . . .	Jurist Reports, New Series. All the Courts. 12 vols.
Kay, . . . . .	Kay's Reports of Decisions of Wood, V.-C., 1853. 1 vol.
Kay & J. . . . .	Kay & Johnson's Rep. of Decisions of Wood, V.-C. 4 vols.
Keb. . . . .	Keble's Reports, King's Bench. 3 vols.

ABBREVIATIONS.	NAME OF WORK, ETC.
Keen, . . . . .	Keen's Reports, Chancery. 2 vols.
Kel. . . . .	Sir John Kelynge's Reports. 1 vol.
Kent, Com. . . . .	Kent's Commentaries, Boston, 1840.
Kirby, . . . . .	Kirby's Reports, Connecticut, 1785—1788. 1 vol. (D.)
Knapp, P. C. R. . . . .	Knapp's Privy Council Reports. 3 vols.
Knapp & O. . . . .	Knapp & Ombler's Election Cases. 1 vol.
L. & Cave, . . . . .	Leigh & Cave's Crown Cases reserved. 1 vol.
L. J., H. L. . . . .	Law Journal (New Series), House of Lords.
L. J., P. C., . . . . .	Law Journal (New Series), Privy Council.
L. J., Ch. . . . .	Law Journal (New Series), Chancery.
L. J., Adm. . . . .	Law Journal (New Series), Admiralty.
L. J., Pr. & Mat. . . . .	Law Journal (New Series), Probate and Matrimonial Cts.
L. J., Bk. . . . .	Law Journal (New Series), Bankruptcy.
L. J., Q. B. . . . .	Law Journal (New Series), Queen's Bench.
L. J., C. P. . . . .	Law Journal (New Series), Common Pleas.
L. J., Ex. . . . .	Law Journal (New Series), Exchequer.
L. J., M. C. . . . .	Law Journal (New Series), Magistrates' Cases.
L. J., Ec. C. . . . .	Law Journal (New Series), Ecclesiastical Cases.
L. J. (O. S.) . . . . .	Law Journal (Old Series). 9 vols.
L. M. & P. . . . .	Lowndes, Maxwell, and Pollock's Practice Cases. 2 vols.
L. R., Ch. D. . . . .	Law Reports, Chancery Division, from 1st Jan., 1876.
L. R., Q. B. D. . . . .	Law Reports, Queen's Bench Division, from 1st Jan., 1876.
L. R., C. P. D. . . . .	Law Reports, Common Pleas Division, from 1st Jan., 1876.
L. R., Ex. D. . . . .	Law Reports, Exchequer Division, from 1st Jan., 1876.
L. R., App. Cas. . . . .	Law Reports, Appeal Cases, from 1st Jan., 1876.
L. R., P. D. . . . .	Law Reports, Probate Division, from 1st Jan., 1876.
L. R., Ir. . . . .	Law Reports, Ireland, from Jan 1, 1878.
LL, U. S. . . . .	Laws of the United States.
Law Mag. . . . .	Law Magazine.
Law Mag., N. S. . . . .	Law Magazine, New Series.
Law R. . . . .	Law Review.
Law Rec. 1st Ser. } or 2nd Ser. }	Law Recorder, 1st and 2nd Series. Irish. 10 vols.
Law Rep., H. L. . . . .	Law Reports, House of Lords.
Law Rep., H. L. Sc. . . . .	Law Reports, Scotch Appeals in House of Lords.
Law Rep., P. C. . . . .	Law Reports, Privy Council.
Law Rep., Ch. Ap. . . . .	Law Reports, Chancery Appeals (Ch. & L.-JJ.)
Law Rep., Eq. . . . .	Law Reports, Equity Cases (M. R. & V.-Ch.)
Law Rep., Q. B. . . . .	Law Reports, Queen's Bench.
Law Rep., C. P. . . . .	Law Reports, Common Pleas.
Law Rep., Ex. . . . .	Law Reports, Exchequer.
Law Rep., C. C. . . . .	Law Reports, Crown Cases Reserved.
Law Rep., P. & D. . . . .	Law Reports, Probate, Divorce, and Matrimonial.
Law Rep., Adm. } & Ec. }	Law Reports, Admiralty and Ecclesiastical.
Lea. . . . .	Leach's Crown Cases. 4th ed., London, 1815. 2 vols.
leg. Obs. . . . .	Legal Observer.
Leigh, R. . . . .	Leigh's Reports, Virginia, 1829—1839. 9 vols. (B.)
Leon. . . . .	Leonard's Reports, King's Bench. 1 vol.
Lev. . . . .	Levinz's Reports, King's Bench. 3 vols.
Lew. C. C. . . . .	Lewin's Crown Cases on Northern Circuit. 2 vols.
Lit. R. . . . .	Littleton's Reports. 1 vol.
Lloyd & G. . . . .	Lloyd & Goold's Ir. Chan. Rep., temp. Sugden, Ch. 1 vol.
Lofft. . . . .	Lofft's Reports, King's Bench. 1 vol.
Long. & T. . . . .	Longfield and Townsend's Rep. Exchequer, Ireland. 1 vol.
Lords' J. . . . .	Journal of the House of Lords.
Ld. Br. Sp. . . . .	Lord Brougham Speeches. 4 vols. 1832.
Ld. Ray. . . . .	Lord Raymond's Rep., King's Bench & Com. Pleas. 3 vols.
Louis . . . . .	Reports of Louisiana, 1830—1840. 16 vols. (B.)

ABBREVIATIONS.	NAME OF WORK, ETC.
Luders . . . . .	Luder's Election Cases. 3 vols.
Lush. Adm. R. . . .	Admiralty Reports, by Vernon Lushington, Esq. 1 vol.
Lutw. . . . .	Lutwyche's Reports, Common Pleas. 2 vols.
M. . . . .	Sir F. Moore's Reports. 1 vol.
M. & Gord. . . . .	Macnaghten & Gordon's Reports, Chancery. 3 vols.
M. & Gr. . . . .	Manning & Granger's Reports, Common Pleas. 7 vols.
M. & M. . . . .	Moody & Malkin's Nisi Prius Reports. 1 vol.
M. & P. . . . .	Moore & Payne's Reports, Common Pleas. 5 vols.
M. & R. . . . .	Manning & Ryland's Reports, King's Bench. 5 vols.
M. & Rob. . . . .	Moody & Robinson's Nisi Prius Reports. 2 vols.
MS. . . . .	Manuscript.
M. & Sc. . . . .	Moore & Scott's Reports, Common Pleas. 4 vols.
M. & Sel. . . . .	Moore & Selwyn's Reports, King's Bench. 6 vols.
M. & W. . . . .	Meeson & Welsby's Reports, Exchequer. 16 vols.
McC. . . . .	McCord's Rep. South Carolina, 1820—1828. 4 vols. (B.C)
McC., Ch. R. . . .	McCord's Chancery Reports, South Carolina, 1825—1827. 2 vols. (B. C.)
McClel. . . . .	McClelland's Reports, Exchequer. 1 vol.
McClel. & Y. . . .	McClelland & Younge's Reports, Exchequer. 1 vol.
Macq. Pr. in H. } of L. . . . . }	Macqueen's Practice in the House of Lords and Privy Council.
Macq. Sc. Cas. H. } of L. . . . . }	Macqueen's Scotch Cases in the House of Lords, 1852. 4 vols.
McDouall, Inst. . .	McDouall's (Ld. Bankton) Institutes of Law of Scotland.
McKinnon, Phil. } of Ev. . . . . }	McKinnon's Philosophy of Evidence.
McNagh. Elem. } of Hindoo L. . . }	McNaghten's Elements of Hindoo Law.
McNally, Ev. . . .	McNally on Evidence, Ireland.
Madd. . . . .	Maddock's Reports, Vice-Chanc. Court. 6 vols.
Magens, . . . . .	Magens on Insurance, London. 1754.
Mann. Dig. N. P. . .	Manning's Digested Index to the Nisi Prius Reports.
Marsh. . . . .	Marshall's Reports, Common Pleas. 2 vols.
A. K. Marsh. . . .	A. K. Marshall's Rep. Kentucky, 1817—1821. 3 vols. (D.)
J. J. Marsh. . . .	J. J. Marshall's Rep., Kentucky, 1829—1832. 7 vols. (D.)
Mart. . . . .	Martin's Reports, Louisiana, 1809—1823. 12 vols. (B.)
Mart., N. S. . . .	Martin's Reports, New Series, Louisiana, 1823—1830. 8 vols. (B.)
Mart., N. Car. R. .	Martin's North Carolina Reports. 1 vol. (D.)
Mart. & Y. . . . .	Martin & Yerger's Rep., Tennessee, 1825—1828. 1 vol. (D)
Masc. de Prob. . .	Mascardus de Probationibus. Francof. ad Mænum. 4 vols., fol., 1684.
Mason, . . . . .	Mason's Reports, United States, 1st Circuit Court, 1816 —1830. 5 vols. (A.). Judge Story's Decisions.
Mass. . . . .	Reports of Massachusetts, 1804—1822. (A.)
Math. Pres. Ev. . .	Mathews' Treatise on Presumptive Evidence. Lond. 1827
May, L. of Parl. . .	May's Law of Parliament, 5th ed. London, 1863.
Menoch. de Præs. .	Menochius de Præsumptionibus, Genevæ, 1670, 2 tom. fol.
Mer. . . . .	Merivale's Reports, Chancery. 3 vols.
Metc. . . . .	Metcalf's Reports, Massachusetts, 1810—1846. (A.)
Milw. Ec. Ir. R. . .	Milward's Eccles. Irish Rep., temp. Dr. Radcliffe.
Min. Ev. . . . .	Minutes of Evidence in Peerage Claims, &c.
Mitf. on Pl. . . . .	Mitford (Ld. Redesdale) on Plead in Chanc., 5th ed. 1847
Mod. . . . .	Modern Reports. All the Courts. 12 vols.
Moll. . . . .	Molloy's Reports, Chancery, Ireland. 3 vols.
Mon. & Ayr. . . . .	Montagu & Ayrton's Reports, Bankruptcy. 3 vols.
Mon. & B. . . . .	Montagu & Blight's Reports, Bankruptcy. 1 vol.
Mon. D. & D. . . .	Montagu, Deacon, & De Gex's Rep. Bankruptcy. 3 vols.
Mon. & McAr . . .	Montagu & McArthur's Reports, Bankruptcy. 1 vol.



ABBREVIATIONS.	NAME OF WORK, ETC.
Monroe, . . . . .	Monroe's Reports, Kentucky, 1824—1828. 7 vols. (D.)
Moo. C. C. . . . .	Moody's Crown Cases Reserved. 2 vols.
Moo. Ind. App. C. . . . .	Moore's Indian Appeals to Privy Council. 14 vols.
Moo. P. C. R. . . . .	Moore's Privy Council Reports. 15 vols.
Moo. P. C., N. S. . . . .	Moore's Privy Council Reports, New Series. 9 vols.
Moore, . . . . .	John Bayly Moore's Reports, Common Pleas. 12 vols.
Morison, . . . . .	Morison's Scotch Reports.
Munf. . . . .	Munford's Reports, Virginia, 1810—1820. 6 vols. (C.)
Murph. . . . .	Murphey's Reports, North Carolina, 1804—1819. (C.)
Myl. & Cr. . . . .	Mylne & Craig's Reports, Chancery. 5 vols.
Myl. & K. . . . .	Mylne & Keen's Reports, Chancery. 3 vols.
N. & M. . . . .	Nevile and Manning's Reports, King's Bench. 6 vols.
N. & P. . . . .	Nevile and Perry's Reports, Queen's Bench. 3 vols.
N. R. . . . .	Bosanquet & Puller's New Rep., Common Pleas. 2 vols.
N. York Civ. Code, . . . . .	The Code of Civil Procedure of New York, 1850.
N. York Cr. Code, . . . . .	The Code of Criminal Procedure of New York, 1850.
Nelson's Col. of } St. Pap. . . . . }	Nelson's Collection of State Papers.
New Hamp. . . . .	Reports of New Hampshire, 1816—1843. (B.)
New R. . . . .	The New Reports in all the Courts. London, 1862. 6 vols.
New Sess. Cas. . . . .	New Sessions Cases, by Carrow, Hammerton, & Allen. 4 vols.
Nott & M'C. . . . .	Nott & M'Cord's Rep., S. Carolina, 1817—1820. 2 vols. (R.)
Noy, . . . . .	Noy's Reports, King's Bench. 1 vol.
Ohio R. . . . .	Hammond's Ohio Reports, Ohio, 1821—1839. 9 vols. (D.)
Ought. . . . .	Oughton's Ordo Judicorum.
Owen, . . . . .	Owen's Reports, King's Bench and Common Pleas. 1 vol.
P. 7 E. 4, fol. 5, } pl. 13 . . . . . }	Mode of citing the Year Books.
P. & D. . . . .	Perry & Davison's Reports, Queen's Bench. 4 vols.
P. Voet, de Stat. . . . .	Paul Voet de Statutis.
P. Wms. . . . .	Peere Williams' Reports, mostly Chancery. 3 vols.
Paige, . . . . .	Paige's Chan. Rep., New York, 1828—1844. 10 vols. (B.)
Paine, . . . . .	Paine's Rep., Un. States, 2nd Circuit Ct., 1810—1826. 1 vol. (B.)
Paine & D. Pr. . . . .	Paine & Duer's Practice of the Courts of the United States, New York, 1830.
Paley, Conv. . . . .	Paley on Convictions.
Paley, Ev. of Chr. . . . .	Paley's Evidences of Christianity. Works, 5 vols. 1830.
Palm. . . . .	Palmer's Reports, King's Bench. 1 vol.
Park, Ina. . . . .	Park on Marine Insurance, 8th edition, London, 1842.
Parl. Deb. . . . .	Parliamentary Debates.
Partid. . . . .	Lopez' Siete Partidas del Rey Alonzo IX., Valladolid, 1587. 4 tom fol.
Pea. Add. Cas. . . . .	Peake's Additional Nisi Prius Cases. 1 vol.
Pea. Ev. . . . .	Peake on Evidence, 5th edition, London, 1822
Pea. R. . . . .	Peake's Nisi Prius Rep., 3rd ed., 1820, but paging of 1st ed. 1 vol.
Pearce & D. . . . .	Pearce & Dearsley's Crown Cases Reserved. 1 vol.
Pears. Chit. Pl. . . . .	Pearson's Chitty, Jun., Prec. in Plead., 2nd ed. 1847.
Peck, . . . . .	Peck's Reports, Tennessee, 1822—1824. 1 vol. (D.)
Penning. . . . .	Pennington's Rep., New Jersey, 1806—1813. 2 vols. (C.)
Pennsylv. . . . .	Reports of Pennsylvania, 1829—1832. 3 vols. (B.)
Per. & K. . . . .	Perry and Knapp's Election Cases. 1 vol.
Pet. . . . .	Peters' Rep., Supreme Courts of United States, 1827— 1843. (A.)
Pet. C. C. R. . . . .	Peters' Circuit Courts Reports, United States, 3rd Circuit Court, 1803—1818. 1 vol. (B.)
Petersd. Abr. . . . .	Petersdorf's Abridgment. 6 vols.

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Ph. Ev. . . . .	Phillipps on Evidence, 9th edition, London, 1843.
Phill. . . . .	Phillipps' Reports, Chancery. 2 vols.
Phillim. R. . . . .	Phillimore's Ecclesiastical Reports. 3 vols.
Pick. . . . .	Pickering's Rep., Massachusetts, 1823—1840. 24 vols. (A.)
Plowd. . . . .	Plowden's Commentaries or Reports. 2 vols.
Pollex. . . . .	Pollexfen's Reports, King's Bench. 1 vol.
Poph. . . . .	Popham's Reports, King's Bench. 1 vol.
Porter, . . . . .	Porter's Reports, Alabama, 1834—1839. 9 vols. (D.)
Poth. Œuv. Posth. . . . .	Pothier, Œuvres Posthumes.
Poth. Obl. . . . .	Pothier on Obligations, by Evans, Philadelphia ed., 1826.
Pr. C. . . . .	Judicial Committee of the Privy Council.
Pr. Min. . . . .	Printed Minutes of Evid. on Peer. Claims in H. of Lords.
Prec. in Ch. . . . .	Precedents in Chancery.
Prest. on Abst. . . . .	Preston's Essay on Abstracts of Title.
Price, . . . . .	Price's Reports, Exchequer. 13 vols.
Puff. . . . .	Puffendorf's Law of Nations.
Q. B. . . . .	Adolphus & Ellis's Rep., New Ser., Queen's Bench. 18 vols.
Quintil. Inst. Orat. . . . .	Quintilianus de Institutione Oratoriâ.
R. . . . .	Rex or Regina.
R. & R. . . . .	Russell & Ryan's Crown Cases Reserved. 1 vol.
Rail. Cas. . . . .	Railway Cases. All the Courts. 7 vols.
Rand. . . . .	Randolph's Reports, Virginia, 1821—1828. 6 vols. (B.)
Rawle, . . . . .	Rawle's Reports, Pennsylvania, 1828—1835. 5 vols. (A.)
Ld. Ray . . . . .	Ld. Raymond's Rep., King's Bench & Com. Pleas. 3 vols.
T. Ray . . . . .	Sir Thomas Raymond's Rep., Common Law Courts. 1 vol.
Reg. Gen. H. T., or E. T., or T. T., or M. T. } . . . . .	Regulæ Generales of Hilary, Easter, Trinity, or Michaelmas Term.
Reid on Human Mind, . . . . .	Dr. Reid's collected Works, edited by Sir William Hamilton, Bart., Edinburgh, 1846.
Rep. . . . .	Lord Coke's Reports. 6 vols.
Rep. on Ch. Pr. . . . .	Report of the Commissioners on Chancery Practice.
Rep. of Cri. Law Com. } . . . . .	Reports of Criminal Law Commissioners.
Rep. tem. Finch . . . . .	Reports in the time of Lord Chancellor Finch. 1 vol.
Rep. tem. Hardw. . . . .	Reports in the time of Lord Hardwicke. 1 vol.
Res. . . . .	Respublica.
Rev. Code, . . . . .	Revised Code.
Rev. St. . . . .	Revised Statutes of different States in America.
Ridg. L. & S. . . . .	Ridgway, Lapp & Schoale's Rep., King's Bench, Irel. 1 vol.
Ridg. P. C. . . . .	Ridgway's Parliamentary Cases, Irish Parliament.
Riley, . . . . .	Riley's Law Cases, South Carolina, 1836—1837. 1 vol. (B.)
Rob. Adm. . . . .	Dr. Roberts' Admiralty Reports. 3 vols.
Rob. on Frauds . . . . .	Roberts on Frauds.
Rob. on Gavel. . . . .	Robinson on Gavelkind, 3rd ed., 1821.
Roberts. . . . .	Robertson's Ecclesiastical Reports. 2 vols.
Rog. on Elect. . . . .	Rogers on Elections. 6th ed. London, 1841.
Roll. Abr. . . . .	Rolle's Abridgment.
Roll. R. . . . .	Rolle's Reports, King's Bench. 2 vols.
Roscoe, Ev. . . . .	Roscoe on Evidence at Nisi Prius. 10th ed. London, 1861.
Rose, . . . . .	Rose's Reports, Bankruptcy. 2 vols.
Russ. . . . .	Russell's Reports, Chancery. 5 vols.
Russ. C. & M. . . . .	Russell on Crimes and Misdemeanors. 3rd ed. Lond., 1843.
Russ. on Fact. . . . .	Russell on Factors and Brokers. London, 1844.
Russ. & Myl. . . . .	Russell & Mylne's Reports, Chancery. 2 vols.
Ry. & M. . . . .	Ryan and Moody's Nisi Prius Reports. 1 vol.
S. C. . . . .	Same Case.
S. P. . . . .	Same Point.
Salk. . . . .	Salkeld's Reports, Common Law Courts. 3 vols.

ABBREVIATIONS.	NAME OF WORK, ETC.
Say. . . . .	Sayer's Reports, King's Bench. 1 vol.
Sch. & Lef. . . . .	Schoales & Lefroy's Reports, Chancery, Ireland. 2 vols.
Scott, . . . . .	Scott's Reports, Common Pleas. 8 vols.
Scott, N. R. . . . .	Scott's New Reports, Common Pleas. 8 vols.
Selw. N. P. . . . .	Selwyn's Law of Nisi Prius. 15th ed. 1859—61, London.
Serg. & R. . . . .	Sergeant & Rawle's Rep., Pennsylv., 1818—29. 17 vols. (A.)
Sess. Ca. . . . .	New Sessions Cases, by Carrow, Hammerton, & Allen. 4 vols.
Shepl. . . . .	Shepley's Reports, Maine, 1836—1841. 6 vols. (C.)
Shep. Touch. . . . .	Sheppard's Touchstone, by Preston.
Shower, . . . . .	Shower's Reports, King's Bench. 2 vols.
Sid. . . . .	Siderfin's Reports, King's Bench. 2 vols.
Sim. . . . .	Simons' Reports, Vice-Chancellor's Court. 17 vols.
Sim. N. S. . . . .	Simons' Reports, New Series, Vice-Chanc. Court. 2 vols.
Sim. & St. . . . .	Simons & Stuart's Reports, Vice-Chanc. Court. 2 vols.
Skinn. . . . .	Skinner's Reports, King's Bench. 1 vol.
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Smith, Ch. Pr. . . . .	Smith's Chancery Practice. 7th ed. London, 1862.
Smith, L. C. . . . .	Smith's Leading Cases. 5th ed. London, 1862.
South. . . . .	Southard's Reports, New Jersey, 1816—1820. 2 vols. (C.)
St. Ev. . . . .	Starkie on Evidence. 3rd ed. 1842, London.
Stair Inst. . . . .	Stair's Institutes of the Law of Scotland.
Stark. R. . . . .	Starkie's Nisi Prius Reports. 3 vols.
Steph. pl. . . . .	Stephen's on Pleading. 5th ed. London. 1843.
Story, Agen. . . . .	Story on Agency. London, 1839.
Story, Bail. . . . .	Story on Bailments.
Story, Bills. . . . .	Story on Bills of Exchange. London, 1843.
Story, Confl. . . . .	Story's Conflict of Laws. 2nd ed. London, 1841.
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Story, R. . . . .	Story's Reports, United States, 1st Circuit, 1839—1845. 3 vols. (A.). Judge Story's Decision.
Str. . . . .	Strange's Reports in all Courts. 2 vols.
Stryk. de Sem. } Prob. . . . . }	Strykius de Semiplenâ Probatione. Strykii Opera Francof. ad Mœnum. 1743—1753. 15 vols. fol.
Sty. . . . .	Styles's Reports, King's Bench. 1 vol.
Sug. Pow. . . . .	Sugden (Lord St. Leonards) on Powers. 8th ed. 1831.
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Sumn. . . . .	Sumner's Reports, 1st Circuit Court of United States. Judge Story's Decisions. 1830—1839. 3 vols. (A.)
Swab. Adm. R. . . . .	Swabey's Rep. in Court of Admiralty. 1858. 1 vol.
Swab. & Trist. . . . .	Swabey & Tristram's Rep. in Ct. of Probate and in Ct. for Divorce & Matrim. Causes. 1858. 4 vols.
Swanst. . . . .	Swanston's Reports, Chancery. 3 vols.
Swift, Dig. . . . .	Swift's American Digest.
Swift, Ev. . . . .	Swift's American Law of Evidence. Hartford.
T. Jones . . . . .	Sir Thomas Jones' Reports. 1 vol.
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T. Ray. . . . .	Sir Thomas Raymond's Rep. The Common Law Cts. 1 vol.
Tait, Ev. . . . .	Tait on Evidence. Edinburgh, 1834.
Taunt. . . . .	Taunton's Reports, Common Pleas. 8 vols.
Tidd. . . . .	Tidd's Practice. 9th ed. London.
Toller on Ex. . . . .	Toller on the Law of Executors and Administrators.
Tomlin, L. Dict. . . . .	Tomlin's Law Dictionary.
Turn. & R. . . . .	Turner & Russell's Reports, Chancery. 1 vol.
Tyr. . . . .	Tyrwhitt's Reports, Exchequer. 5 vols.
Tyr. & Gr. . . . .	Tyrwhitt & Granger's Reports, Exchequer. 1 vol.

ABBREVIATIONS.	NAME OF WORK, ETC.
U. S. . . . .	United States.
V.-C. . . . .	Vice-Chancellor.
V. John. . . . .	Vaughan Johnson's Reports, in V.-C. Wood's Court. 1 vol.
Van Leeuw. Comm.	Van Leeuwen's Commentaries.
Vaugh. . . . .	Vaughan's Reports, Common Pleas. 1 vol.
Ventr. . . . .	Ventris's Reports, King's Bench and Common Pleas. 1 vol.
Verm. . . . .	Vermont's Reports, Vermont, 1826—1837. 9 vols. (B.)
Vern. . . . .	Vernon's Reports, Chancery. 2 vols.
Ves. . . . .	Vesey, Junior's Reports, Chancery. 22 vols.
Ves. & B. . . . .	Vesey & Beames' Reports, Chancery. 3 vols.
Ves. Sen. . . . .	Vesey, Senior's Reports, Chancery. 3 vols.
Vin Abr. . . . .	Viner's Abridgment.
Virg. Cas. . . . .	Virginia Cases, Virginia, 1789—1826. 2 vols. (D.)
W. Bl. . . . .	Sir William Blackstone's Reports, (K. B. & C. P.) 2 vols.
W. Jon. . . . .	Sir William Jones' Reports, King's Bench. 1 vol.
W. N. . . . .	Weekly Notes, edited by Council of Law Reporting.
W. R. . . . .	Weekly Reporter. 26 vols.
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Watk. Copyh. . . . .	Watkins on Copyholds.
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Webst. Pat. R. . . . .	Webster's Reports on Patent Cases. 1 vol.
Wend. . . . .	Wendall's Reports, New York, 1828—1841. (A.)
Whart. . . . .	Wharton's Reports, Pennsylvania, 1835—1840. 6 vols. (A.)
Whately's Log. . . . .	Whateley's Logic. 3rd ed. London, 1829.
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Wils. . . . .	Wilson's Rep., King's Bench and Common Pleas. 3 vols.
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Wing. Max. . . . .	Wingate's Maxims.
Wms. Saund. . . . .	Saunders' Rep., edited by Williams, J., 6th ed., 1845. 3 vols.
Wood, Inst. LL. Eng. } . . . . .	Wood's Institutes of the Laws of England. Fol. 1772.
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Y. & J. . . . .	Younge & Jervis's Reports, Exchequer. 3 vols.
Yeates, . . . . .	Yeates' Reports, Pennsylvania, 1791—1808. 4 vols. (B.)
Yelv. . . . .	Yelverton's Reports, King's Bench. 1 vol.
Yerg. . . . .	Yerger's Reports, Tennessee, 1832—1837. 10 vols. (D.)
You. . . . .	Younge's Reports, Exchequer in Equity. 1 vol.

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"	"	4 . . . .	1107	1876		285 . . . .	487
"	"	5 . . . .	1591	"		286 . . . .	1543
"	"	6 . . . .	1191	"		287 . . . .	1543
"	"	7 . . . .	471, 488	"		288 . . . .	643
"	"	8 . . . .	471	"		289 . . . .	1106
"	"	9 . . . .	471				

### FORMS.

A

PRACTICAL TREATISE

ON THE

LAW OF EVIDENCE.

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PART I.

NATURE AND PRINCIPLES OF EVIDENCE.

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CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 1.<sup>1</sup> THE word EVIDENCE, considered in relation to Law, § 1 includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. This term and the word *proof* are often used as synonyms; but the latter is applied by accurate logicians, rather to the *effect* of evidence, than to evidence itself.<sup>2</sup> None but mathematical truth is susceptible of that high degree of evidence called *demonstration*, which excludes all possibility of error. In the investigation of matters of fact such evidence cannot be obtained; and the most that can be said is, that there is no reasonable doubt concerning them.<sup>3</sup> The true question, therefore, in trials of fact is not, whether it is possible

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<sup>1</sup> Gr. Ev. § 1, in great part.

<sup>2</sup> See Wills Cir. Ev. 2; Whately's Log. B. ii. c. iii. § 1; N. York Civ. Code, § 1660.

<sup>3</sup> See Gamb. Guide, 121. Even of mathematical truths this writer justly remarks, that, though capable of demonstration, they are admitted by most men solely on the *moral evidence* of general notoriety. Id. 196. See N. York Civ. Code, § 1663.

that the testimony may be false, but whether there is sufficient probability of its truth ; that is, whether the facts are proved by competent and satisfactory evidence.

§ 2.<sup>1</sup> By *competent evidence* is meant that which the law § 2 requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry. By *satisfactory evidence*, which is sometimes called *sufficient evidence*, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined ; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of an ordinary man ; and so to convince him, that he would venture to act upon that conviction in matters of important personal interest.<sup>2</sup> Questions respecting the competency or admissibility of evidence are entirely distinct from those which respect its sufficiency or effect ; the former being exclusively within the province of the court ; the latter belonging exclusively to the jury.<sup>3</sup>

§ 3.<sup>4</sup> This branch of the law may be considered under three § 3 general heads, namely, *First*, The Nature and Principles of Evidence ;—*Secondly*, The Object of Evidence, and the Rules which govern its production ;—And, *Thirdly*, The Means of Proof, or the Instruments by which facts are established. This Order will be followed in the present Treatise ; but before proceeding further, it will be convenient, first, to consider what matters the courts will of themselves notice without proof, and next, to offer a few observations respecting the functions of the judge, as distinguished from those of the jury.

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<sup>1</sup> Gr. Ev. § 2, almost verbatim.

<sup>2</sup> 1 St. Ev. 578.

<sup>3</sup> 1 Ph. Ev. 2 ; *Carpenters' Co. v. Hayward*, 1 Doug. 375, per Buller, J.

<sup>4</sup> Gr. Ev. § 3, in great part.

## CHAPTER II .

MATTERS JUDICIALLY NOTICED, WITHOUT PROOF.<sup>1</sup>

§ 4.<sup>2</sup> ALL civilised nations, being alike members of the great family of sovereignties, may well be supposed to recognise each other's existence, and general public and external relations. Every sovereign therefore recognises, and, of course, the public tribunals and functionaries of every nation notice, the existence and titles of all the other sovereign powers in the civilised world.<sup>3</sup> If, however, upon a civil war in any country, one part of the nation should separate from the other, and establish for itself an independent government, the newly-formed nation cannot be recognised as such by the judicial tribunals of other nations, until it has been acknowledged by the sovereign power under which those tribunals are constituted.<sup>4</sup> Still the judges are bound, *ex officio*, to know whether or not the government has recognised such nation as an independent state.<sup>5</sup>

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<sup>1</sup> See N. York Civ. Code, §§ 1705, 1706.

<sup>2</sup> Gr. Ev. § 4, in great part.

<sup>3</sup> United States of America v. Wagner, 2 Law Rep. Ch. Ap. 585, per Ld. Chelmsford, Ch.; 36 L. J., Ch. 628, S. C. From Yrisarri v. Clement, 11 Moore, 314, 315; 2 C. & P. 225, S. C., it seems that the existence of States unacknowledged by the government must be proved by evidence, showing that they are associations formed for mutual defence, supporting their own independence, making laws, and having courts of justice. The two Reports somewhat differ, but the latter lays down the soundest law. This case is also reported in 3 Bing. 432.

<sup>4</sup> City of Berne v. Bk. of Eng., 9 Ves. 347.

<sup>5</sup> Taylor v. Barclay, 2 Sim. 213. In that case it was falsely alleged in the bill, with the view of preventing a demurrer, that Guatemala, a revolted colony of Spain, had been recognised by Great Britain as an independent state; but the V.-Ch. took judicial notice that the allegation was false. See, however, Dolder v. Bk. of Eng., 10 Ves. 354, where Ld. Eldon observed, "I cannot affect to be ignorant of the fact, that the revolutions in Switzerland have not been recognised by the government of this country; but as a judge, I cannot take notice of that." It may well be doubted whether this last case is law.

§ 5. In like manner the judges will recognise, without proof, § 5 the common<sup>1</sup> and statute law,<sup>2</sup> and all legal claims, demands, estates, titles, rights, duties, obligations, and liabilities existing by the common law, or by any custom, or created by any statute;<sup>3</sup> the rules of equity, and all equitable estates, titles, rights, duties, and liabilities;<sup>4</sup> the cardinal doctrine that, whenever the rules of equity and of the common law differ, those of equity must prevail;<sup>5</sup> the law of nations; the law and custom of parliament, and the privileges and course of proceedings of each branch of the legislature;<sup>6</sup> the prerogatives of the crown,<sup>7</sup> and the privileges of the royal palaces;<sup>8</sup> the maritime law;<sup>9</sup> the ecclesiastical law;<sup>10</sup> the articles of war, whether in the naval,<sup>11</sup> the marine, or the land

<sup>1</sup> Hein. ad Pand., L. xxii. t. iii. § 119.

<sup>2</sup> *R. v. Sutton*, 4 M. & S. 542; 13 & 14 V., c. 21, § 7. As to private Acts of Parl., see 8 & 9 V., c. 113, § 3, cited post, § 7.

<sup>3</sup> 36 & 37 V., c. 66, § 24, subs. 6; 40 & 41 V., c. 57, § 27, subs. 6, Ir.

<sup>4</sup> 36 & 37 V., c. 66, § 24, subs. 4, enacts, that the High Court of Justice and the Court of Appeal "respectively, and every judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act." See, also, 40 & 41 V., c. 57, § 27, subs. 4, Ir.

<sup>5</sup> 36 & 37 V., c. 66, § 25, subs. 11, enacts, that generally in all matters, "in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail." See *Bustros v. White*, 45 L. J., Q. B. 642, per Ct. of App.; L. R., 1 Q. B. D. 423; S. C. See, also, 40 & 41 V., c. 57, § 28, subs. 11, Ir.

<sup>6</sup> *Lake v. King*, 1 Wms. Saund. 131 a; *Stockdale v. Hansard*, 7 C. & P. 731; 9 A. & E. 1, and 2 P. & D. 1, S. C.; *Wason v. Walter*, 8 B. & S. 671; 38 L. J., Q. B. 34; 4 Law Rep., Q. B. 73, S. C.; *Cassidy v. Steuart*, 2 M. & Gr. 437; *Case of the Sheff. of Middlx.*, 11 A. & E. 273; *Sims v. Marryat*, 17 Q. B. 292. *Bradlaugh v. Gosset*, 53 L. J., Q. B. 209; L. R. 12; Q. B. D. 271, S. C.

<sup>7</sup> *R. v. Elderton*, 2 Ld. Ray. 980.

<sup>8</sup> *Id.* Reported, also, in 3 Salk. 91, 284; 6 Mod. 73; and Holt, 590; *Winter v. Miles*, 10 East, 578; 1 Camp. 475, S. C.; *Att.-Gen. v. Donaldson*, 10 M. & W. 117. Hampton Court has ceased to have privileges as a royal palace, *Att.-Gen. v. Dakin*, 36 L. J., Ex. 167; and 2 Law Rep., Ex. 290; S. C., per Ex. Ch., 3 Law Rep., Ex. 288; and 37 L. J., Ex. 150; S. C. in Dom. Proc. 4 Law Rep., H. L. 338; and 39 L. J., Ex. 113; *R. v. Ponsonby*, 3 Q. B. 14.

<sup>9</sup> *Chandler v. Grieves*, 2 H. Bl. 606 a.

<sup>10</sup> 1 Roll. Abr. 526; 6 Vin. Abr. 496; *Sims v. Marryat*, 17 Q. B. 292, per Ld. Campbell.

<sup>11</sup> 29 & 30 V., c. 109.



service,<sup>1</sup> including those made for the government of the forces in India,<sup>2</sup> as well as the auxiliary forces,—that is, the militia, the yeomanry, and the volunteers,<sup>3</sup>—and also the reserve forces;<sup>4</sup> the rules of procedure made in pursuance of § 70 of the Army Act, 1881, “whether signified under the hand of a secretary of state” in relation to the army,<sup>5</sup> or promulgated by the admiralty with respect to the marines;<sup>6</sup> royal proclamations, such being acts of State;<sup>7</sup> the general practice of conveyancers;<sup>8</sup> the custom of merchants,<sup>9</sup> at least where such custom has been settled by judicial determinations,<sup>10</sup>—such, for example, as the lien which a vendor has

<sup>1</sup> By § 69 of the Army Act, 1881, 44 & 45 V., c. 58, the Queen is empowered “to make articles of war for the better government of officers and soldiers, and such articles shall be judicially taken notice of by all judges, and in all courts whatsoever;” and by § 179, subs. 1, and 20, of the same Act, power is reserved to the Ld. High Admiral, or any two of the commissioners for executing his office, to “make articles of war for the Royal Marines;” and such articles it is presumed—though the Act is silent on the subject—must also be judicially noticed.

<sup>2</sup> Id., § 180.

<sup>3</sup> Id., §§ 175—178.

<sup>4</sup> Id., § 190, subs. 9.

<sup>5</sup> Id., § 70, subs. 1 & 3.

<sup>6</sup> Id., § 179, subs. 6.

<sup>7</sup> There exists some doubt upon this point. In *Dupays v. Shepherd* 12 Mod. 216, Ld. Holt held that a proclamation in print was of as public a nature as a public act of parliament; but in *Van Omeron v. Dowick*, 2 Camp. 44, Ld. Ellenborough refused to take notice of a proclamation, on the ground that the Gazette containing it was not produced. The marginal note to this last case is calculated to mislead, as it asserts broadly, that “a judge at Nisi Prius will not take judicial notice of the king’s proclamations.” The case does not go this length, which is tantamount to saying that royal proclamations must be laid before the jury, but simply decides that, when a judge’s memory is at fault, some document must be at hand to establish the fact which he is called upon to notice. Copies of royal proclamations, if purporting to be printed by the Queen’s printer, are rendered admissible by 8 & 9 V., c. 113, § 3; see post, § 7. They may be proved also in a variety of other ways. See 31 & 32 V., c. 37, § 2, cited post, § 1527.

<sup>8</sup> *Willoughby v. Willoughby*, 1 T. R. 772, per Ld. Hardwicke; *Doe v. Hilder*, 2 B. & A. 793; *Doe v. Plowman*, 2 B. & Ad. 577; *Rowe v. Grenfel*, Ry. & M. 398, per Ld. Tenterden. Ld. St. Leonards observes, in 3 V. & P. 28, “It matters very little what is the opinion of any individual conveyancer; but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their settled rule of practice has, accordingly, in several instances been adopted as the law of the land, not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice.” See also *Howard v. Ducane*, 1 Turn. & R. 86, per Ld. Eldon. In *Re Rosher* 53 L. J., Ch. 722, 731, per Pearson, J.

<sup>9</sup> *Eriksine v. Murray*, 2 Ld. Ray. 1542; *Soper v. Dibble*, 1 Ld. Ray. 175; *Carter v. Downish*, Carth. 83; *Williams v. Williams*, id. 269.

<sup>10</sup> *Barnett v. Brandao*, 6 M. & Gr. 630. In that case, where judicial notice

on goods remaining in his possession for unpaid purchase-money,<sup>1</sup> or the general lien of an innkeeper on all the property belonging to his guest for the entire amount of his bill,<sup>2</sup> or the general lien of bankers and factors on the securities of their customers in their custody,<sup>3</sup> or the practice of drawing bills of lading in sets, and of dealing with one of a set as representing the cargo independently of the rest,<sup>4</sup> or the usage among money dealers of treating scrip

was taken by the Ct. of Ex. Ch. of the general lien of bankers on the securities of their customers in their custody, *Ld. Denman*, in pronouncing the judgment of the court, said, "The law-merchant forms a branch of the law of England; and those customs, which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce: and when so adopted, it is unnecessary to *plead and prove* them. They are binding on all *without proof*. Accordingly we find that usages affecting bills of exchange and bills of lading, are taken notice of judicially."—P. 665. His lordship then states, that, "in the case of a factor, the right to a general lien" is, "in modern practice, treated as a matter of settled law, and no proof is ever required that such general lien exists, as a matter of fact;" and he adds, that "the lien of bankers, who are a species of factors in pecuniary transactions, stands on the same footing," and, consequently, their right to such lien "need not be pleaded, but the courts are judicially bound to take notice of it."—P. 666. This lien extends to Exchequer bills.—*Id.* The judgment of the Ex. Ch. in the above case was afterwards reversed by the House of Lords, but that portion of it which relates to judicial notice of the general lien of bankers, was affirmed. *Brandao v. Barnett*, 12 Cl. & Fin. 787; 3 Com. B. 519, S. C. So, in *Edie v. E. India Co.*, 2 Burr. 1226, which turned upon the question, whether a bill payable to A. or order, and indorsed personally to B., could be afterwards indorsed by B. to another, Mr. J. Willmot observed, "The custom of merchants is part of the law of England, and courts of law must take notice of it as such. There may, indeed, be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful, and even then the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law."—P. 1228. *Ld. Mansfield*, however, with *Denison and Foster, JJ.*'s, rejected the testimony of witnesses to prove the usage, solely on the ground that the question had *already been solemnly settled* by two adjudications in the courts of law. See pp. 1224—1226. See also *Jones v. Peppercorn*, 28 L. J., Ch. 158.

<sup>1</sup> *Imperial Bk. v. Lond. & St. Katherine's Dock Co.*, 46 L. J. Ch. 337, per *Jessel. M. R.*; L. R. 5 Ch. D. 195, S. C.

<sup>2</sup> *Mulliner v. Florence*, L. R. 3 Q. B. D. 484, per Ct. of App.; 47 L. J. Q. B. 700, S. C.

<sup>3</sup> See cases cited, ante, n.<sup>10</sup>, p. 5; also *Lond. Chart. Bk. of Australia v. White*, L. R. 4 App. Cas. 413, 422.

<sup>4</sup> *Sanders v. Maclean*, 52 L. J. Q. B. 481, per Ct. of App.; L. R. 11 Q. B. D. 327, S. C.

certificates payable to bearer, whether of a foreign Government or of a company, as negotiable instruments transferable on delivery;<sup>1</sup> or the custom of hotel-keepers holding their furniture on hire;<sup>2</sup> the customs which regulate the special descent of gavelkind and borough English lands,<sup>3</sup> and it seems any other custom incident to such tenures;<sup>4</sup> the custom or law of the road, viz., that horses and carriages should respectively keep on the near or left side;<sup>5</sup> and the following rules with respect to navigation,—first, that ships and steamboats, on meeting “end on or nearly end on, in such a manner as to involve risk of collision,” should port their helms, so as to pass on the port, or left, side of each other; next, that steamboats should keep out of the way of sailing ships; and next, that every vessel overtaking another should keep out of its way.<sup>6</sup> So,

<sup>1</sup> *Goodwin v. Roberts*, L. R. 1 App. Cas. 476; 10 Law Rep., Ex. 76 and 337, S. C.; *Rumball v. Metrop. Bk.*, L. R., 2 Q. B. D. 194; 46 L. J.; Q. B. 346, S. C.

<sup>2</sup> *Crawcour v. Salter*, L. R. 18 Ch. D. 30, 53, 54, per Ct. of App.; 51 L. J. Ch. 495, S. C.

<sup>3</sup> 1 Bl. Com. 76; *Doe v. Seudamore*, 2 Ld. Ray. 1025; Co. Lit. 175 b; *Crosby v. Hetherington*, 4 M. & Gr. 946, per Tindal, C.J.

<sup>4</sup> In *Rider v. Wood*, 24 L. J. Ch. 737, Wood, V.-C., acting on the authority of *Payne v. Barker*, as reported in *Bridg.* 18, 23, 26, held that the court would judicially notice all the customs incident to borough English tenures. See also 36 & 37 V., c. 66, § 24, subs. 6.

<sup>5</sup> This rule has been embodied by Professor Selwyn, in what an Etonian would call “Longs and Shorts:”—

“Sed precor hoc posthac reminiscere, carpe sinistram :  
Dextram occurrenti linquere norma jubet.”

What is perhaps more to the lawyer's purpose, the rule has also been repeatedly recognised by the judges at Nisi Prius, in actions for negligent driving and riding. See *Leame v. Bray*, 3 East, 593, as to carriages, and *Turley v. Thomas*, 8 C. & P. 104, per Coleridge, J., as to saddle horses. See also 14 & 15 V., c. 92, § 13, Ir. In France the law of the road is different, and horses and carriages there pass on the off side.

<sup>6</sup> The regulations for preventing collisions at sea, which contain the rules concerning lights, fog signals, steering and sailing, are now embodied in a table issued by virtue of the Act 25 & 26 V., c. 63, § 25, “Ord. of 11 Aug. 1884, as to British ships and boats, and Ord. of 14 Aug. 1879, as to Foreign ships.” See 32 L. J., Pr. Mat. & Adm. 1; 1 Lush. Adm. R., App. i.; and 3 Law Rep. Adm. & Ecc. 611, 612. § 26 of the same Act enacts how these regulations are to be published and proved, and § 28 enacts, that in case any damage to person or property arises from the non-observance by any ship of these regulations, such damage shall be deemed to have been caused by the wilful default of the person in charge of the deck of such ship, unless it be proved that circumstances made a

every judge will notice the particular customs which have been tried, determined, and recorded in his own court.<sup>1</sup> So, also, the customs of London, which have been certified by the recorder,<sup>2</sup> such, for example, as the custom of foreign attachment<sup>3</sup>—the custom that every shop is a market overt for goods of the same kind as are usually sold there<sup>4</sup>—the custom that married women may be sole traders<sup>5</sup>—and the custom which defines the nature of a liveryman's office,<sup>6</sup>—will be judicially noticed by the respective

departure from the regulations necessary. See post, § 206; *Gen. St. Nav. Co. v. Hedley*, 3 Law Rep. P. C. 44; *Dryden v. Allix*, 1 Moo. P. C. N. S. 528; *The Concordia*, 1 Law Rep., Adm. & Ecc. 93; *The Spring*, 1 Law Rep., Adm. & Ecc. 99. As to the law prior to these regulations, see *Chadwick v. City of Dublin St. Packet Co.*, 6 E. & B. 771; *Smith v. Voss*, 2 H. & N. 97; *Zugasti v. Lamer*, 12 Moo. P. C. R. 331; *Maddox v. Fisher*, 14 Moo. P. C. R. 103; *Williams v. Gutch*, id. 202; *Tuft v. Warman*, 2 Com. B., N. S. 740. See *Morrison v. Gen. St. Navig. Co.*, 8 Ex. R. 733; *Gen. St. Navig. Co. v. Morrison*, 13 Com. B. 581; *Gen. St. Navig. Co. v. Mann*, 14 Com. B. 127; *Lawson v. Carr*, 10 Moo. P. C. R. 162; *Churchward v. Palmer*, 10 Moo. P. C. R. 472; *La Plata*, 1 Swab. Adm. R. 298; *Morgan v. Sim*, 11 Moo. P. C. R. 307.

<sup>1</sup> *Dr. & St.* 34; 1 Bl. Com. 76.

<sup>2</sup> *Crosby v. Hetherington*, 4 M. & Gr. 933, 946; *Bruin v. Knott*, 12 Sim. 452—456; *Blacquiére v. Hawkins*, 1 Doug. 380, per Ld. Mansfield. See *Blunt v. Lack*, 26 L. J. Ch. 148. But uncertified customs must be proved in Westminster Hall, though they will be judicially noticed in the City Cts.; *Stainton & wife v. Jones*, 1 Doug. 380, n. 96, per Ld. Mansfield. So, also, the Q. B. Div. in Ireland will not judicially notice a custom of the Ld. May. & Sheff.'s Ct. in Dublin, unless certified by the recorder; *Simmonds v. Andrews*, 1 Jebb & Sy. 531.

<sup>3</sup> Certified by Starkey in 22 Ed. 4. See 1 Roll. Abr. 554 K 5; *Bruce v. Wait*, 1 M. & Gr. 39; *Crosby v. Hetherington*, 4 M. & Gr. 933; *Westoby v. Day*, 2 E. & B. 605.

<sup>4</sup> Certified by Sir E. Coke, 5 Rep. 83 b; S. C., rather more at length, as *L'Evesque de Worcester's case*, M. 360; S. C., Poph. 84. See *Lyons v. De Pass*, 11 A. & E. 326; and 9 C. & P. 68, S. C., where the custom was held to apply, though the premises were described in evidence as a warehouse, and were not sufficiently open to the street for a person on the outside to see what passed within. See, also, *Crane v. London Dock Co.*, 33 L. J. Q. B. 224; 5 B. & S. 313, S. C.

<sup>5</sup> *Lavie v. Phillips*, 3 Burr. 1776. Other local customs, as that of carting whores in London, or that of foreign attachment in Bristol, Liverpool, and Chester, are noticed in the respective city courts, 1 Doug. 380, n. 96, and therefore need not be set out on the record. In such cases, if the judgment of the court below is brought before a court of error, such court will also judicially notice the existence of the custom. See *Bruce v. Wait*, 1 M. & Gr. 24, 41, n. a.

<sup>6</sup> *King v. Clerk*, 1 Stalk. 349; cited by Parke, B., in *Piper v. Chappell*, 14 M. & W. 649.

courts in which the certificates are recorded;<sup>1</sup> but no one court can take notice of a custom, which has merely been certified to another.<sup>2</sup> Neither can judicial notice be taken of the usages prevalent among mining partnerships conducted on the cost-book principle, for, without evidence, the judges cannot determine the meaning of the term "cost-book principle."<sup>3</sup> Moreover, the courts will not take cognisance of the laws, usages, or customs of a foreign state; and so strictly is this rule enforced, that all foreign laws, the laws of the colonies,<sup>4</sup> and even the laws of Jersey,<sup>5</sup> Guernsey, or Scotland, must be proved as facts,<sup>6</sup> unless steps have been taken, either under the "British Law Ascertainment Act, 1859,"<sup>7</sup> or under the "Foreign Law Ascertainment Act, 1861,"<sup>8</sup> to obtain a legal opinion on the subject from a superior court of the country, whose laws are under dispute.<sup>9</sup> As the laws of Ireland are substantially the same as those of England, except so far as they are varied by statute, it is apprehended that no proof respecting them would be required; and in accordance with this view a very able judge has suggested that the courts at Westminster would judicially recognise the fact, that an action must be commenced by *process* in Ireland.<sup>10</sup>

§ 6. The courts will also judicially notice the following seals:— § 6  
the Great Seal of the United Kingdom, and the Great Seals of

<sup>1</sup> The custom, which formerly regulated the distribution of the personal estate of intestate freemen of the city of London, and other similar customs in York and other places, are now abrogated by 19 & 20 V., c. 94.

<sup>2</sup> *Piper v. Chappell*, 14 M. & W. 649, 650, per Parke, B.

<sup>3</sup> *In re Bodmin United Mines Co.*, 23 Beav. 370.

<sup>4</sup> *Prowse v. The European & Amer. St. Shipping Co.*, 13 Moo. P. C. R. 484; S. C., nom., *The Peerless*, 1 Lush. Adm. R. 103.

<sup>5</sup> *Brenan's case*, 10 Q. B. 498, per Patteson, J.

<sup>6</sup> *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54; *Mostyn v. Fabrigas*, 1 Cowp. 174, per Ld. Mansfield; *Sussex Peer. case*, 11 Cl. & Fin. 114—117; *Male v. Roberts*, 3 Esp. 163, per Ld. Eldon; *R. v. Povey*, 22 L. J., M. C. 19; *Pearce & D.* 32, S. C.; *Woodham v. Edwards*, 5 A. & E. 771; 1 N. & P. 207, S. C.; *Wey v. Yally*, 6 Mod. 194; *Story, Confli.* § 637, and cases cited in n. See also post, §§ 48, 1423—1425.

<sup>7</sup> 22 & 23 V., c. 63.

<sup>8</sup> 24 & 25 V., c. 11.

<sup>9</sup> See *Lord v. Colvin*, 1 Drew. & Sm. 24; *Login v. Princess of Coorg*. 30 Beav; 632.

<sup>10</sup> *Reynolds v. Fenton*, 3 Com. C. 194, per Maule, J., explaining *Ferguson v. Mahon*, 11 A. & E. 179; 3 P. & D. 143, S. C.

England, Ireland, and Scotland respectively,<sup>1</sup> the Queen's Privy Seal and Privy Signet, whether in England, Ireland, or Scotland;<sup>2</sup> the Wafer Great Seal, and the Wafer Privy Seal, framed under the Crown Office Act, 1877;<sup>3</sup> the seal, and the privy seal, of the duchy of Lancaster; the seal, and the privy seal, of the duchy of Cornwall;<sup>4</sup> the seals of the old superior courts of justice; and of the Supreme Court, and its several Divisions; the old Chancery Common Law seal,<sup>5</sup> and the seal of the old Chancery Enrolment office;<sup>6</sup> the seals of the old High Court of Admiralty, whether for England or Ireland;<sup>7</sup> of the Prerogative Court of Canterbury;<sup>8</sup> and of the Court of the Vice-Warden of the Stannaries;<sup>9</sup> the seals of all courts constituted by Act of Parliament, if seals are given to them by the Act,<sup>10</sup> and, therefore, the seals of the Court for Divorce and Matrimonial causes in England;<sup>11</sup> of the Court for Matrimonial causes and matters in Ireland;<sup>12</sup> of the Central Office of the Royal Courts of Justice, and of its several Departments;<sup>13</sup> of the principal Registry, and of the several district Registries of the Supreme Court of Judicature;<sup>14</sup> of the principal Registry, and of the several district Registries of the old Court of Probate in England<sup>15</sup> and of the present Court of Probate in Ireland;<sup>16</sup> of the old<sup>17</sup> and new Courts of Bankruptcy;<sup>18</sup> of the Insolvent Debtors' Court,<sup>19</sup> now

<sup>1</sup> Lord Melville's case, 29 How St. Tr. 707.

<sup>2</sup> Foggassa's case, 24 Edw. 3, 23, cited in *Olive v. Guin*, 2 Sid. 146; *Lane's case*, 2 Rep. 17 b.

<sup>3</sup> 40 & 41 V., c. 41, § 4.

<sup>4</sup> 26 & 27 V., c. 49, § 2.

<sup>5</sup> 12 & 13 V., c. 109, § 11.

<sup>6</sup> 12 & 13 V., c. 109, § 17.

<sup>7</sup> *Green v. Waller*, 2 Ld. Ray. 893; 24 & 25 V., c. 10, § 14, now repealed by 44 & 45 V., c. 59; 30 & 31 V., c. 114, § 21, Ir.

<sup>8</sup> *Kempton v. Cross*, Rep. Tem. Hardw. 108.

<sup>9</sup> 6 & 7 W. 4, c. 106, § 19.

<sup>10</sup> *Doe v. Edwards*, 1 P. & D. 408; 9 A. & E. 554, S. C.

<sup>11</sup> 20 & 21 V., c. 85, § 13.

<sup>12</sup> 33 & 34 V., c. 110, § 11, Ir.

<sup>13</sup> Rules of Sup. Ct. 1883, Ord. LXI., rr. 1, 6, 7.

<sup>14</sup> 36 & 37 V., c. 66, § 61.

<sup>15</sup> 20 & 21 V., c. 77, § 22.

<sup>16</sup> 20 & 21 V., c. 79, § 27, Ir.

<sup>17</sup> See 24 & 25 V., c. 134, § 204, and 32 & 33 V., c. 71, § 109.

<sup>18</sup> 46 & 47 V., c. 52, § 137, enacts, that every court having jurisdiction in bankruptcy, shall have a seal, and "judicial notice shall be taken of the seal, and of the signature of the judge or registrar of any such court, in all legal proceedings." The Bankruptcy Rules of 1883 provide, by r. 12, that "all summonses, petitions, notices, orders, warrants, and other process issued by the court, shall be sealed." See also r. 14, as to sealing of "office copies."

<sup>19</sup> *Doe v. Edwards*, 1 P. & D. 408; 9 A. & E. 554, S. C.

abolished; of the Court of Bankruptcy and Insolvency in Ireland,<sup>1</sup> which, since the 6th of August, 1872, has been called "The Court of Bankruptcy in Ireland;"<sup>2</sup> of the several United Diocesan Courts and Registries in Ireland;<sup>3</sup> of the Landed Estates Court, Ireland;<sup>4</sup> of the Record of Title Office of that Court;<sup>5</sup> and of the County Courts.<sup>6</sup> They will also judicially notice the seal of the corporation of London,<sup>7</sup> and perhaps the seal of a notary-public, he being an officer recognized by the whole commercial world.<sup>8</sup> Several other seals are rendered admissible in evidence without proof of their genuineness, by the express language of particular statutes; and among them may be noticed the seal of the Local Government Board, whether for England<sup>9</sup> or for Ireland;<sup>10</sup> of the late Poor-law Board<sup>11</sup> of the late Local Boards of Health,<sup>12</sup> and of the new Urban Sanitary Authorities,<sup>13</sup> and Joint Sanitary Boards;<sup>14</sup> of the now abolished Commissioners for the Sale of Incumbered Estates in Ireland;<sup>15</sup> of the Land Registry Office in England,<sup>16</sup> whether established under the Act of 1862 or under that of 1875; of the District Registry Offices created under the Act last referred to<sup>17</sup> of the Office for the Registration of Assurances of Lands in Ireland;<sup>18</sup> of the Irish Land Commission;<sup>19</sup> of the General Register Office in

<sup>1</sup> 20 & 21 V., c. 60, § 362 Ir.

<sup>2</sup> 35 & 36 V., c. 58, § 6, Ir.

<sup>3</sup> 27 & 28 V., c. 54, §§ 9, 50, Ir., now repealed by 32 & 33 V., c. 42, § 21, Ir.

<sup>4</sup> 21 & 22 V., c. 72, § 8, Ir.

<sup>5</sup> 28 & 29 V., c. 88, § 56 Ir.

<sup>6</sup> 9 & 10 V., c. 95, §§ 3, 57, 111.

<sup>7</sup> Doe v. Mason, 1 Esp. 53, per Ld. Kenyon.

<sup>8</sup> Anon., 12 Mod. 345; Bayl. Bills, 490; *Hutcheon v. Mannington*, 6 Ves. 823; *Cole v. Sherard*, 11 Ex. R. 482, and *Furnell v. Stackpoole* Milw., Ex. Ir. R. 485, 486. But see *In re Earl's Trusts*, 4 Kay & J. 300, where it was held that the seal of a notary public of a foreign country not under the Queen's dominion could not be judicially noticed. See, also, *In re Davis's Trusts*, 8 Law Rep. Eq. 98; *Nye v. Macdonald*, 39 L. J., P. C. 34; 3 Law Rep., P. C. 331, S. C.; in which last case it was held that the execution of a deed in a colony could not be proved by a notary's certificate.

<sup>9</sup> 34 & 35 V., c. 70, § 5.

<sup>10</sup> 35 & 36 V., c. 69, § 4, Ir.

<sup>11</sup> 10 & 11 V., c. 109, § 5; 1 & 2 V., c. 56, § 121, Ir.; 10 & 11 V., c. 90, § 3, Ir.

<sup>12</sup> 11 & 12 V., c. 63, § 35; 21 & 22 V., c. 98, § 4.

<sup>13</sup> 38 & 39 V., c. 55, § 7.

<sup>14</sup> 38 & 39 V., c. 55, § 280; 41 & 42 V., c. 52, § 13, Ir.

<sup>15</sup> 12 & 13 V., c. 77, § 2, Ir. See 21 & 22 V., c. 72, § 23, Ir.

<sup>16</sup> 25 & 26 V., c. 53, § 123, enacts, that "a seal shall be prepared for the land registry office; and any instrument purporting to be sealed with such seal shall be admissible in evidence;" 38 & 39 V., c. 87, § 107.

<sup>17</sup> 38 & 39 V., c. 87, § 120.

<sup>18</sup> 13 & 14 V., c. 72, § 45, Ir.

<sup>19</sup> 44 & 45 V., c. 49, § 42, Ir.

England,<sup>1</sup> or Ireland;<sup>2</sup> of the Charity Commissioners for England and Wales;<sup>3</sup> of the Railway Commissioners;<sup>4</sup> of the Commissioners of Her Majesty's Works and Public Buildings;<sup>5</sup> of the Land Commissioners for England, by which general title the old Inclosure Commissioners, Copyhold Commissioners, and Tithe Commissioners are now designated;<sup>6</sup> of the respective Commissioners for the Universities of Oxford and Cambridge;<sup>7</sup> of the Prison Commissioners for England, and of the General Prisons Board for Ireland;<sup>8</sup> of the special Commissioners for Irish Fisheries;<sup>9</sup> of the Commissioners of Public Works in Ireland, at least for the purposes of the Drainage Acts,<sup>10</sup> and of the Settled Land Act, 1882;<sup>11</sup> of the Patent Office;<sup>12</sup> of the Office of the Registrar of Designs for articles of manufacture;<sup>13</sup> and of the Record Office, whether in England<sup>14</sup> or in Ireland.<sup>15</sup> In all proceedings, too, under the winding-up clauses of the Companies Act, 1862, the seal of any office of the Court of Chancery, or Bankruptcy, in England or in Ireland, of the Court of Session in Scotland, or of the Court of the Vice-Warden of the Stanneries, when appended to any document made, issued, or signed

<sup>1</sup> 6 & 7 W. 4, c. 86, § 38. See 3 & 4 V., c. 92, § 9.

<sup>2</sup> 26 & 27 V., c. 11, § 5, Ir.

<sup>3</sup> 16 & 17 V., c. 137, § 6. 18 & 19 V., c. 124, § 4, enacts, that "every act of the board may be sufficiently authenticated by the seal of the Commissioners, and the signature of the secretary, or, in his absence, of the chief clerk." § 5 enacts, that all "orders, certificates, schemes, and other documents, issued under the seal of the board shall be deemed and taken to be the originals, and copies thereof shall be entered in the books of the board, and all such entries may be sufficiently certified by the signature of the secretary, or, in his absence, of the chief clerk; every order, certificate, scheme, and other document, purporting to be sealed with the seal of the board, shall be received in evidence without further proof; and any writing purporting to be a copy extracted from the said books, and to be certified as aforesaid, shall be received in evidence in like manner."

<sup>4</sup> 36 & 37 V., c. 48, § 4.

<sup>5</sup> 15 & 16 V., c. 28, § 1; 37 & 38 V., c. 84, § 2.

<sup>6</sup> 45 & 46 V., c. 38, § 48.

<sup>7</sup> 40 & 41 V., c. 48, §§ 4, 9.

<sup>8</sup> 40 & 41 V., c. 21, § 6, and c. 49, § 4, Ir.

<sup>9</sup> 26 & 27 V., c. 114, § 33, Ir.; continued by 31 & 32 V., c. 111; and amended by 32 & 33 V., c. 92, Ir.

<sup>10</sup> 26 & 27 V., c. 88, §§ 3, 5, Ir.; 29 & 30 V., c. 49 § 21, Ir.

<sup>11</sup> 45 & 46 V., c. 38, §§ 48, 65, suba. 9.

<sup>12</sup> 46 & 47 V., c. 57, § 84.

<sup>13</sup> 5 & 6 V., c. 100, § 18; and 6 & 7 V., c. 65, §§ 6, 7. "Both these Acts now repealed by 46 & 47 V., c. 57, § 113, & Sch. 3."

<sup>14</sup> 1 & 2 V., c. 94, § 11.

<sup>15</sup> 30 & 31 V., c. 70, § 18, Ir.



under those clauses, or any official copy thereof, must be judicially noticed.<sup>1</sup>

§ 7. The principle of admitting in evidence official documents § 7 without formal proof, was extended to a numerous class of cases by the Documentary Evidence Act, of 1845.<sup>2</sup> That statute, after reciting that "it is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, by-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes,"—that "the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine,"—and that "it is expedient to facilitate the admission in evidence of such and the like documents:" enacts, that "*whenever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same,*

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<sup>1</sup> 25 & 26 V., c. 89, § 125.

<sup>2</sup> 8 & 9 V., c. 113. The author of the present work naturally feels some satisfaction in referring to this statute, as he originally suggested to the Law Amend. Soc. the alterations embodied therein, and afterwards prepared the bill, which, under the protection of Ld. Brougham, obtained the sanction of the legislature.

and without and further proof thereof in every case in which the original record could have been received in evidence.”<sup>1</sup>

Sect. 2 enacts, that “all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take *judicial notice* of the signature of any” judge of the Supreme Court of Judicature,<sup>2</sup> “provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.”

Sect. 3 enacts, that “all copies of private and local and personal Acts of Parliament not public Acts, if *purporting* to be printed by the Queen’s printers, and all copies of the journals of either House of Parliament, and of royal proclamations, *purporting* to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed.”<sup>3</sup>

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<sup>1</sup> The words after the last comma were introduced into the Act while passing through the House of Commons. They appear to have been copied from the Act of 1 & 2 V., c. 94, § 13 (cited post, § 1533, n.) by some Honourable Member, who did not know distinctly what he was about.

<sup>2</sup> 36 & 37 V., c. 66.

<sup>3</sup> § 4 provides, that “if any person shall forge the seal, stamp, or signature of any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or of any certified copy of any document, by-law, entry in any register or other book, or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of or relating to any corporation, or company already established, or to any corporation or company to be hereafter established,—or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate, or other judicial or official document, or shall tender in evidence, any order, decree, certificate, or other judicial or official document with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit,—or if any person shall print any copy of any private Act, or of the journals of either House of Parliament,\* which copy shall falsely purport to have been printed by the

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\* The words “of of any royal proclamation,” were introduced into the original draft of the bill, and would seem to have been accidentally omitted. The omission, however, is remedied by 31 & 32 V., c. 37, § 4, cited, post, § 1527, in n.

§ 9. An Act, which was passed in the year 1865 to remove doubts as to the validity of colonial laws,<sup>1</sup> has simplified the mode of proving such laws, by enacting in § 6, that "the certificate of the clerk or other proper officer of a legislative body in any colony, to the effect that the document to which it is attached is a true copy of any colonial law assented to by the Governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure by the said Governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the Governor; and any proclamation purporting to be published by authority of the Governor in any newspaper in the colony to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent." § 8A

§ 10. Other facilities in the proof of foreign and colonial documents had already been afforded in 1851 by Lord Brougham's Act to amend the Law of Evidence.<sup>2</sup> The seventh section of this statute enacts, that "all proclamations, treaties, and other acts of § 9

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printers to the Crown, or by the printers to either House of Parliament, or by any or either of them,—or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed,—every such person shall be guilty of felony, and shall upon conviction be liable to " (penal servitude for a period not exceeding seven years or less than five years, see 20 & 21 V., c. 3, § 2, as amended by 27 & 28 V., c. 47, § 2), "or to imprisonment for any term not more than three nor less than one year, with hard labour: PROVIDED ALSO, that whenever any such document as before mentioned shall have been received in evidence by virtue of this Act, the court, judge, commissioner, or other person officiating judicially who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised, at its or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster, on application being made for that purpose." § 5 enacts, that the Act shall not extend to Scotland. See 24 & 25 V., c. 98, §§ 27—29.

<sup>1</sup> 28 & 29 V., c. 63.

<sup>2</sup> 14 & 15 V., c. 99.

state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice, in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned: that is to say, if the document sought to be proved be a proclamation,<sup>1</sup> treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign and colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

§ 11. Moreover, the statute passed in 1855 to enable British § 9A  
diplomatic and consular agents to administer oaths and to perform  
notarial acts,<sup>2</sup> much simplifies the proof of affidavits sworn "in

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<sup>1</sup> See 18 & 19 V., c. 119, § 97, as to proof of proclamations made by governors of colonies under the Passengers' Act, 1855.

<sup>2</sup> 18 & 19 V., c. 42. The provisions of this Act, somewhat enlarged, are  
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*foreign parts out of Her Majesty's dominions;"* for it enacts, in § 3, that "any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any British ambassador, envoy, minister, chargé d'affaires, secretary of embassy or of legation, consul-general, consul, vice-consul, acting consul, pro-consul, or consular agent, in testimony of any oath, affidavit, affirmation, or" notarial "act having been administered, sworn, affirmed, had, or done by or before him, shall be admitted in evidence, without proof of any such seal and signature being the seal and signature of the person whose seal and signature the same purport to be, or of the official character of such person."<sup>1</sup>

§ 12. Order XXXVIII. of the Rules of the Supreme Court, 1883, § 10 contains an important clause on this subject; for, after providing, in Rule 6, that "all examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the Central Office, may be sworn and taken in Scotland, or Ireland, or the Channel Islands,<sup>2</sup> or in any colony, island, plantation, or place *under the dominion of Her Majesty in foreign parts*, before any judge, court, notary public, or person lawfully authorised to administer oaths<sup>3</sup> in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls<sup>4</sup> in any foreign parts out of Her Majesty's dominions,"—it goes on to provide, that "the judges

made applicable to affidavits, &c., used in the Court of Probate, or in the Court for Divorce, or in the Irish Court for Matrimonial Causes. See § 31 of 21 & 22 V., c. 95; § 20 of 21 & 22 V., c. 108; and § 16 of 34 & 35 V., c. 49, Ir.

<sup>1</sup> § 4 enacts, that persons swearing or affirming falsely under the Act shall be guilty of perjury, and § 5 enacts, that persons forging the seal or signature of any such diplomatic or consular agent, or knowingly tendering in evidence any document with a false seal or signature thereto, shall be guilty of felony. See post, §§ 1567, 1568, as to §§ 1 & 2 of the Act.

<sup>2</sup> Or the Isle of Man, see 16 & 17 V., c. 78, § 6.

<sup>3</sup> In *Baillie v. Jackson*, 3 De Gex, M. & G. 38, the Lds. Js. refused to take judicial notice of the signature of the Registrar of Deeds in St. Vincent, which was appended to the certificate of a deed as registered in the proper office of the island, it being admitted that the Registrar had no authority to administer an oath.

<sup>4</sup> If there be no consul or vice-consul accessible, the affidavit may be sworn before a *notary public*. *Cooke v. Wilby*, 53 L. J. Ch. 592, per Chitty, J.

and other officers of the High Court<sup>1</sup> shall *take judicial notice* of the *seal* or *signature*, as the case may be, of any such court, judge, notary public,<sup>2</sup> person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document."<sup>3</sup> A similar clause is also inserted in the English Chancery Act of 1852,<sup>4</sup> the Chancery (Ireland) Act, 1867,<sup>5</sup> the Lunacy Regulation (Ireland) Act, 1871,<sup>6</sup> the Court of Admiralty Act, 1854,<sup>7</sup> the Court of Admiralty (Ireland) Act, 1867,<sup>8</sup> the Court of Probate Act, 1858,<sup>9</sup> the Court for Divorce Act of the same year,<sup>10</sup> the Matrimonial Causes (Ireland) Act, 1871,<sup>11</sup> and the Crown Suits, &c., Act, 1865.<sup>12</sup>

§ 13. Again, the Bankruptcy Act for Scotland,<sup>13</sup> which was passed in 1856, facilitates the proof of certain Scottish judicial documents by enacting in § 174, that "all deliverances,"—which fantastical term includes all orders, warrants, judgments, decisions, interlocutors, or decrees under that Act,<sup>14</sup>—"purporting to be signed by the Lord Ordinary or by any of the judges of the Court of Session, or by the sheriff [or sheriff substitute],<sup>15</sup> as well as all extracts or copies thereof, or from the books of the Court of Session, or the Sheriff Court, purporting to be signed or certified by any clerk of court, or extracts from or copies of registers purporting to be made by the keeper thereof, or extractor, shall be

<sup>1</sup> Or of the Chancery of the County Palatine of Lancaster, see 16 & 17 V., c. 78, § 7.

<sup>2</sup> See ante, n. <sup>2</sup>, p. 11.

<sup>3</sup> See *Brooke v. Brooke*, 50 L. J. Ch. 528, per Fry, J.; L. R. 17 Ch. D. 833, S. C. The same law applies to affidavits made in matters in lunacy, see 16 & 17 V., c. 70, § 57, and also to "all affidavits, declarations, and affirmations, to be used before any registrar or other officer of any registry office in Great Britain or Ireland, for any purpose connected with registration of deeds or wills or other documents or things, under the authority of parliament," see 16 & 17 V., c. 78, § 6.

<sup>4</sup> 15 & 16 V., c. 86, § 22, which, for some occult reason, or for none, was not repealed by 46 & 47 V., c. 49.

<sup>5</sup> 30 & 31 V., c. 44, § 81, Ir.

<sup>6</sup> 34 & 35 V., c. 22, § 25, Ir.

<sup>7</sup> 17 & 18 V., c. 78, § 8.

<sup>8</sup> 30 & 31 V., c. 114, § 57, Ir.

<sup>9</sup> 21 & 22 V., c. 95, § 32.

<sup>10</sup> 21 & 22 V., c. 108, § 21.

<sup>11</sup> 34 & 35 V., c. 49, § 17, Ir.

<sup>12</sup> 28 & 29 V., c. 104, § 18. See also § 43 of the same Act.

<sup>13</sup> 19 & 20 V., c. 79.

<sup>14</sup> § 4.

<sup>15</sup> Id.

judicially noticed by all courts and judges in England, Ireland, and Her Majesty's other dominions, and shall be received as *prima facie* evidence, without the necessity of proving their authenticity or correctness, or the signatures appended, or the official character of the persons signing, and shall be sufficient warranty for all diligence and execution by law competent."

§ 14.<sup>1</sup> In America, the signature of the Chief of the Executive § 12 of the State is recognised without proof;<sup>2</sup> and so, in Louisiana, are also the signatures of executive and judicial officers to all official acts.<sup>3</sup> The English doctrine certainly does not extend this length, though it is difficult to define its exact limits. On the one hand, the signatures of the judges of the Supreme Court of Judicature, and of the old superior equity and common law judges, must be judicially noticed, if appended to any judicial or official document;<sup>4</sup> and the legislature has attached the same credit to the signatures of the judges, commissioners and registrars of the old Courts,<sup>5</sup> and of the judges and registrars of the new Courts,<sup>6</sup> of Bankruptcy in England, and of the judges, registrars, and chief clerks of the Court of Bankruptcy and Insolvency, now called the Court of Bankruptcy,<sup>7</sup> in Ireland.<sup>8</sup> So, in all proceedings under the winding-up clauses of the Companies Act, 1862, judicial notice must be taken of the signatures of the officers of the old Courts of Chancery in England or Ireland, or of the Courts of Bankruptcy in England or Ireland, or of the Court of Session in Scotland, or of the registrar of the Court of the Vice-Warden of the Stannaries, whenever such signatures are subscribed to any document made, issued, or signed under such clauses, or any official copy thereof.<sup>9</sup> Many other signatures attached to documents, which are rendered admissible by statutes, need not be proved;<sup>10</sup> and it seems also that,

<sup>1</sup> Gr. Ev. § 6, in part, as to first four lines.

<sup>2</sup> *Jones v. Gale's Exors.*, 4 Mart. 635.

<sup>3</sup> *Id.*; *Wood v. Fitz*, 10 Mart. 196.

<sup>4</sup> 8 & 9 V., c. 113, § 2, ante, § 7.

<sup>5</sup> 24 & 25 V., c. 134, § 204; 32 & 33 V., c. 71, § 109.

<sup>6</sup> 46 & 47 V., c. 52, § 137, cited ante, p. 10, n. <sup>10</sup>.

<sup>7</sup> 35 & 36 V., c. 58, § 6, *Ir.*

<sup>8</sup> 20 & 21 V., c. 60, § 362, *Ir.*, cited ante, p. 11, n. <sup>1</sup>.

<sup>9</sup> 25 & 26 V., c. 89, § 125.

<sup>10</sup> 8 & 9 V., c. 113, § 1, ante, § 7. A partial list of the more important of these documents will be given in Part. iii. Ch. iv., on Public Documents.

in practice, no proof is required of the handwriting of the governor of Holloway Prison,<sup>1</sup> which for all purposes of law is now regarded as the Queen's Prison.<sup>2</sup> On the other hand, it appears highly probable that the courts would not recognise the signatures of the Lords of the Treasury to their official letters;<sup>3</sup> and it is even a matter of some doubt whether the royal sign-manual would be judicially noticed. On one occasion,<sup>4</sup> before the House of Peers, a warrant purporting to be so signed was admitted without proof, but as the party putting in this document was prepared to prove it if necessary, the acquiescence of the opposite counsel amounts to little. In another case,<sup>5</sup> the judges decided that the King's sign-manual was admissible to show His Majesty's intention of pardoning a prisoner; and, in a third case,<sup>6</sup> the sign-manual was actually produced for the very purpose; but on neither of these occasions was any question raised as to the necessity of proving the signature to be genuine.

§ 15. The judges will take notice of the *London, Dublin, or Edinburgh Gazette* on its mere production, and it is unnecessary to prove that it was bought at the office of the Queen's printer, or to offer any evidence as to whence it came.<sup>7</sup> § 13

§ 16.<sup>8</sup> It is unnecessary to prove facts which may certainly be known from the invariable course of nature; such as that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery;<sup>9</sup> neither is it necessary to prove the course of time,<sup>10</sup> or of the heavenly bodies:<sup>11</sup> nor the § 14

<sup>1</sup> 25 & 26 V., c. 104, § 12.

<sup>2</sup> See *Alcock v. Whatmore*, 8 Dowl. 615; *Short v. Williams*, 4 Dowl. 357; *Fogarty v. Smith*, Id. 598, n.; 5 & 6 V., c. 22.

<sup>3</sup> *R. v. Jones*, 2 Camp. 131, per Ld. Ellenborough. See 12 & 13 V., c. 89, cited post, § 1106; and 31 & 32 V., c. 37, cited post, § 1527.

<sup>4</sup> Ld. Melville's case, 29 How. St. Tr. 706.

<sup>5</sup> *R. v. Miller*, 2 W. Bl. 797; 1 Lea. 74, S. C.

<sup>6</sup> *R. v. Gully*, 1 Lea. 98.

<sup>7</sup> *R. v. Forsyth*, R. & R. 274; 31 & 32 V., c. 37, §§ 2, 5, cited post, § 1527. See *R. v. Holt*, 5 T. R. 436. The Irish case, *R. v. Wallace*, 17 Ir. Law R., N. S. 206, can no longer be relied upon. See post, § 1527.

<sup>8</sup> Gr. Ev. § 5, in part.

<sup>9</sup> *Heathcote's Divorce*, 1 Macq. Sc. Cas. H. of L. 277; *R. v. Luffe*, 8 East, 202.

<sup>10</sup> See *Bury v. Blogg*, 12 Q. B. 877, 882.

<sup>11</sup> However, in *Collier v. Nokes*, 2 C. & Kir. 1012, Wilde, C. J., is reported (2886)



ordinary public fasts and festivals;<sup>1</sup> nor the commencement or ending of the legal sittings;<sup>2</sup> nor the coincidence of the years of the reign of any sovereign of this country with the years of our Lord;<sup>3</sup> nor the coincidence of days of the week with days of the month;<sup>4</sup> nor the order of the months;<sup>5</sup> nor the meaning of the word "month," which at common law and in equity<sup>6</sup> used to mean four weeks, but which in the ecclesiastical courts,<sup>7</sup> and also when used, either in mercantile transactions in the city of London,<sup>8</sup> or in bills of exchange or promissory notes,<sup>9</sup> or in any statute passed since the commencement of 1851,<sup>10</sup> or, in the Rules of the Supreme Court,<sup>11</sup> or in any judgment or order of that court,<sup>12</sup> means a calendar month,<sup>13</sup> unless words be added showing lunar month to be intended; nor the meaning of other words in the vernacular language,<sup>14</sup> as for instance, the word "time," which, unless speci-

to have held that he could not judicially notice at what hour the sun set in the month of November. See, also, *Tutton v. Darke*, 5 H. & N. 649, 650, per Pollock, C. B. Sed qu.?

<sup>1</sup> 6 Vin. Abr. 492, pl. 8—44.

<sup>2</sup> 6 Vin. Abr. 490, pl. 32.

<sup>3</sup> *Holman v. Burrow*, 2 Ld. Ray. 795; *R. v. Pringel*, 2 M. & Rob. 276.

<sup>4</sup> 6 Vin. Abr. 492, pl. 6, 7, 8; *Hoyle v. Ld. Cornwallis*, 1 Str. 387; *Page v. Faucet*, Cro. El. 227; *Harry v. Broad*, 2 Salk. 626; *Brough v. Parkings*, 2 Ld. Ray. 994, per Ld. Holt. Thus the Court is bound judicially to notice what days of the month fall on Sundays, *Hanson v. Shackelton*, 4 Dowl. 48; *Pearson v. Shaw*, 7 Ir. Law R. 1.

<sup>5</sup> *R v. Brown*, M. & M. 164.

<sup>6</sup> See Cons. Ord. Ch. 1860, Ord. xxxvii., r. 10, now annulled.

<sup>7</sup> *Bluck v. Rackman*, 5 Moo. P. C. R. 308, per Knight-Bruce, V.-C.; *Man v. Ricketts*, 2 Coop. 21, per Ld. Lynhurst; *Simpson v. Margitson*, 11 Q. B. 23; *Johnstone v. Hudleston*, 4 B. & C. 932; per Bayley, J.

<sup>8</sup> *Turner v. Barlow*, 3 Fost. & Fin. 946, per Erle, C. J.

<sup>9</sup> 45 & 46 V., c. 61, § 14 subs. 4, and § 89.

<sup>10</sup> 13 & 14 V., c. 21, §§ 4, 8.

<sup>11</sup> Ord. lxvi. r. 1, "Where by these Rules, or by any judgment or order given or made after [the 24th of October, 1883,] time for doing any act or taking any proceeding is limited by months, and where the word 'month' occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months, unless otherwise expressed."

<sup>12</sup> *Id.*

<sup>13</sup> As to the meaning of a "calendar month" as applied to imprisonment, see *Migotti v. Colville*, 48 L. J., C. P. 695, per Ct. of App.; *S. C. nom. Migotti v. Colville*, 14 Cox, 305.

<sup>14</sup> *Clementi v. Golding*, 2 Camp. 25, as to the meaning of the word "book"; *Com. v. Kneeland*, 20 Pick. 229; 6 Vin. Abr. 491, 492, pl. 6, 7; *R. v. Woodward*, 1 Moo. C. C. 323. In that case the prisoner was indicted under 7 & 8 G. 4, c. 30, § 17, which made it a felony maliciously to burn any stack of *pulse*, for setting fire to a stack of *beans*, and the judges unanimously held (2887)

fically stated, indicates in Great Britain "Greenwich mean time," and in Ireland "Dublin mean time;" or the word "distance," which, except under special circumstances, is measured as the crow flies;<sup>2</sup> nor the legal weights and measures,<sup>3</sup> nor the positive value of the coin of the realm;<sup>4</sup> nor its relative value at different periods of time;<sup>5</sup> nor, it seems, any matters of public history, affecting the whole people.<sup>6</sup>

§ 17.<sup>7</sup> Courts also notice the territorial extent of the jurisdiction § 15 and sovereignty exercised *de facto* by their own government;<sup>8</sup> and

that they were bound to notice that beans were a species of pulse. So in *R. v. Swatkins*, 4 C. & P. 548, Patteson, J., after conferring with Bosanquet, J., judicially noticed that *barley* was *corn*, in an indictment for arson under the Act just mentioned. In *R. v. Beaney*, R. & R. 416, however, the judges refused to notice that a colt was an animal of the horse species. There the indictment charged the prisoner with stealing two colts. By the Act then in force, the benefit of clergy was taken away from persons stealing "horses, geldings, or mares"; and as colts were not mentioned *eo nomine*, the prisoner was merely convicted of simple larceny. <sup>143 & 44 V., c. 9, § 1.</sup>

<sup>2</sup> *Mouflet v. Cole*, 7 Law Rep., Ex. 70; 41 L. J., Ex. 28, S. C.; and 8 Law Rep., Ex. 32; 42 L. J., Ex. 8, S. C., per Ex. Ch.

<sup>3</sup> *Hockin v. Cooke*, 4 T. R. 314; *O'Donnell v. O'Donnell*, 1 L. R. Ir. 284; 41 & 42 V., c. 49.

<sup>4</sup> *Glossop v. Jacob*, 1 Stark. R. 69; *Kearney v. King*, 2 B. & Al. 301.

<sup>5</sup> *Bryant v. Foot*, 3 Law Rep., Q. B. 7; 37 L. J., Q. B. 217; 9 B. & S. 444, S. C. <sup>6</sup> *Bk. of Augusta v. Earle*, 13 Pet. 590.

<sup>7</sup> Gr. Ev. § 6, as to first seven lines, in great part.

<sup>8</sup> See 6 & 7 V., c. 94, which,—after reciting that "by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions: and whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm; and it is expedient that such doubts should be removed:"—enacts, that "it is and shall be lawful for Her Majesty to hold exercise, and enjoy any power or jurisdiction which Her Majesty now hath, or may at any time hereafter have, within any country or place out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory."

§ 2 enacts, that "every act, matter, and thing which may at any time be done, in pursuance of any such power or jurisdiction of Her Majesty, in any country or place out of Her Majesty's dominions, shall in all courts ecclesiastical and temporal, and elsewhere within Her Majesty's dominions, be and be deemed and adjudged to be, in all cases, and to all intents and purposes whatsoever, as valid and effectual as though the same had been done according to the local law then in force within such country or place."

§ 3 enacts, that "if in any suit or other proceedings, whether civil or (2888)

the local divisions of their country, such as states,<sup>1</sup> provinces,<sup>2</sup> counties,<sup>3</sup> counties of cities, cities,<sup>4</sup> towns, parishes, and the like, so far as political government is concerned or affected; but not the relative positions of such local divisions, nor their precise boundaries, further than they may be described in public statutes.<sup>5</sup> Thus the courts refused to say judicially that "a part of the coast called Suffolk" was not in Kent, or that "Orfordness, in the county of Suffolk," was not situated between the North Foreland and Beachy Head.<sup>6</sup> Neither will they notice that a particular place is within a certain city;<sup>7</sup> nor that a particular town is within a certain diocese;<sup>8</sup> nor that a street mentioned in the pleadings is a

criminal, in any court ecclesiastical or temporal within Her Majesty's dominions, any issue or question of law or of fact shall arise, for the due determination whereof it shall, in the opinion of the judge or judges of such court, be necessary to produce evidence of the existence of any such power or jurisdiction as aforesaid, or of the extent thereof, it shall be lawful for the judge or judges of any such court, and he or they are hereby authorised to transmit, under his or their hand and seal or hands and seals, to one of Her Majesty's principal secretaries of state, questions, by him or them properly framed respecting such of the matters aforesaid as it may be necessary to ascertain in order to the due determination of any such issue or question as aforesaid; and such secretary of state is hereby empowered and required, within a reasonable time in that behalf, to cause proper and sufficient answers to be returned to all such questions, and to be directed to the said judge or judges, or their successors; and such answers shall, upon production thereof, be final and conclusive evidence, in such suit or other proceedings, of the several matters therein contained and required to be ascertained thereby."

<sup>1</sup> Whyte v. Rose, 4 P. & D. 199; 3 Q. B. 495, S. C. There the Court noticed, that by "the Kingdom of Ireland" was meant that part of the United Kingdom called Ireland. <sup>2</sup> Id.

<sup>3</sup> Deybel's case, 4 B. & A. 242; 2 Inst. 557, where it is said, "the King's Courts" "take notice of all the counties of England." In R. v. Isle of Ely, 15 Q. B. 827, the court judicially noticed that the Isle of Ely was a division of a county in the nature of a riding, and, as such, *prima facie* liable to repair bridges within it. So, also, in Harris v. O'Loughlen, 5 I. R. Eq. 514, 520, the Irish M. R. took judicial notice of the baronies in an Irish county, such baronies having been enumerated in 13 & 14 V., c. 68, Sch. A.

<sup>4</sup> R. v. St. Maurice, 16 Q. B. 908.

<sup>5</sup> Deybel's case, 4 B. & A. 242; 2 Inst. 557; Fazakerley v. Wiltshire, 1 Str. 469; R. v. Burrigge, 3 P. Wms. 497; Thorne v. Jackson, 3 Com. B. 661.

<sup>6</sup> Deybel's case, 4 B. & A. 243. See, also, Kirby v. Hickson, 1 L. M. & P. 364, where the Court of C. P. refused to take judicial notice that Park-street, Grosvenor-square, in the county of Middlesex, was within twenty miles of Russel-square, in the same county.

<sup>7</sup> Brune v. Thompson, 2 Q. B. 789, in which case the plaintiff was nonsuited for not proving that the Tower of London was within the City of London.

<sup>8</sup> R. v. Simpson, 2 Ld. Ray. 1379.

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public thoroughfare, though the word "street," *via strata*, would rather imply that it was;<sup>1</sup> nor that a particular street is not in a certain county, though it be notorious that a street bearing the same name is in another county;<sup>2</sup> nor that a city mentioned in a document is in a particular country, even though it appear that one with a similar name is the capital of such country.<sup>3</sup> They have, however, noticed that the Queen's Prison is situated in England.<sup>4</sup>

§ 18.<sup>5</sup> The courts will judicially recognise the political constitution or frame of their own government; its essential political agents or public officers sharing in its regular administration; and its essential and regular political operations and actions. Thus all tribunals notice the accession and demise of the sovereign of their country;<sup>6</sup> the heads of departments, and the principal officers of state, whether past or present;<sup>7</sup> the marshals and sheriffs, but not the deputies of these functionaries;<sup>8</sup> the existence of a war in which their country is engaged, at least when such war is recognised in public proclamations or Acts of Parliament;<sup>9</sup> the days of special public fasts and thanksgivings, when recognised in like manner; the stated days of general political elections; the

<sup>1</sup> Grant v. Moser, 5 M. & Gr. 129, per Tindal, C. J.

<sup>2</sup> Humphreys v. Budd, 9 Dowl. 1000. See Thorne v. Jackson, 3 Com. B. 661.

<sup>3</sup> Kearney v. King, 2 B. & A. 301. There the declaration was on a bill drawn and accepted at Dublin, to wit, at Westminster, for 542*l*. The court held that, upon this declaration, the bill must be taken to have been drawn in England for English money, and therefore, that proof of a bill drawn at Dublin in Ireland for Irish money, which is of less value, was a fatal variance.

<sup>4</sup> Wickens v. Goatly, 11 Com. B. 666.

<sup>5</sup> Gr. Ev. § 6, in part.

<sup>6</sup> Holman v. Burrow, 2 Ld. Ray. 794; R. v. Pringle, 2 M. & Rob. 276.

<sup>7</sup> R. v. Jones, 2 Camp. 131; Bennett v. The State of Tennessee, Mart. & Y. 133; Whaley v. Carlisle, 17 Ir. Law R., N. S. 792. In this last case, the court, in 1866, judicially noticed that Ld. Hawkesbury had been foreign minister in 1803.

<sup>8</sup> See Grant v. Bagge, 3 East, 128.

<sup>9</sup> Dolder v. Ld. Huntingfield, 11 Ves. 292; R. v. De Berenger, 3 M. & Sel. 67. It seems that when war is neither publicly proclaimed, nor noticed in any statute, the question of its existence is one solely for the jury, 1 Hale, 164; Fost. C. L., d. 1, c. 2, § 12; and the existence of war between foreign countries will not be judicially noticed, Dolder v. Ld. Huntingfield, 11 Ves. 292, per Ld. Eldon.

date and place of the sittings of the legislature;<sup>1</sup> and, in short, to borrow the language of the court in *Taylor v. Barclay*, "all public matters which affect the government of the country."<sup>2</sup> But they will not recognise private orders made at the council-table,<sup>3</sup> for these are matters of particular concernment; nor, it seems, any orders of Council, even though they regard the Crown and the government;<sup>4</sup> nor the transactions on the journals of either House of Parliament.<sup>5</sup>

§ 19. Lastly, each Division of the Supreme Court is bound § 17 judicially to notice its own rules and course of proceeding;<sup>6</sup> as well as the rules and practice of the other Divisions;<sup>7</sup> and also the limits of their respective jurisdictions,<sup>8</sup> as, for instance, that the Probate, Divorce, and Admiralty Division has so far jurisdiction over the personal estate of an intestate British subject, whether situated in Ireland, the colonies, or any foreign country, that it may grant letters to administer such property, and, indeed, must do so before the administrator can sue in any English Court in respect thereof.<sup>9</sup> They will further notice the privileges of their officers<sup>10</sup> and solicitors,<sup>11</sup> which last term,—probably, as being more euphonistic than "attorneys,"—is now made by the legislature to include those functionaries as well as the heretofore proctors of the Ecclesiastical Courts.<sup>12</sup> So all Courts will judicially notice the fact

<sup>1</sup> *R. v. Wilde*, 1 Lev. 396; 1 Doug. 97, n. 41; *Birt v. Rothwell*, 1 Ld. Ray. 210, 343.

<sup>2</sup> 2 Sim. 221

<sup>3</sup> 6 Vin. Abr. 490.

<sup>4</sup> *Att.-Gen. v. Theakstone*, 8 Price, 89. See post, §§ 1527, 1664.

<sup>5</sup> *R. v. Knollys*, 1 Ld. Ray. 10, 15. Copies of the journals are now admissible, if purporting to be printed by the official printers, 8 & 9 V., c. 113, § 3, cited ante, § 7.

<sup>6</sup> *Dobson v. Bell*, 2 Lev. 176; *Pugh v. Robinson*, 1 T. R. 118.

<sup>7</sup> *Lane's case*, 2 Rep. 16 b.; *Worlich v. Massey*, Cro. Jac. 67; *Mounson v. Bourn*, Cro. Car. 526; *Reidy v. Pierce*, 11 Ir. Law R., N. S. 374, per Pigot, C. B.; *Caldwell v. Hunter*, 10 Q. B. 85, 86.

<sup>8</sup> *Doe v. Caperton*, 9 C. & P. 116. See *Spooner v. Juddow*, 6 Moo. P. C. R. 257.

<sup>9</sup> See *Whyte v. Rose*, 3 Q. B. 493, per Ex. Ch.

<sup>10</sup> *Ogle v. Norcliffe*, 2 Ld. Ray. 869.

<sup>11</sup> *Stokes v. Mason*, 9 East, 426; *Chatland v. Thornley*, 12 East, 544; *Hunter v. Neck*, 3 M. & Gr. 181; 3 Scott, N. R. 448, S. C.; *Walford v. Fleetwood*, 14 M. & W. 449.

<sup>12</sup> Sup. Ct. of Jud. Act, 1873, 36 & 37 V., c. 66, § 87.

that the assizes, though constituting for some purposes one legal day, may be continued from day to day with or without adjournment, and often occupy several natural days,<sup>1</sup>—the existence of Courts of general jurisdiction,<sup>2</sup>—the powers of the Ecclesiastical Courts,—and the jurisdiction of the Bankruptcy Courts,<sup>3</sup> together with all general rules made by the Lord Chancellor with the concurrence of the President of the Board of Trade, for carrying into effect the objects of the Bankruptcy Act, 1883.<sup>4</sup> So, all general orders or regulations, which from time to time may be made by the Board of Trade, for regulating matters of an administrative character under the same Act, must be judicially noticed, provided they be printed by the Queen's printers, and purport to be issued under the authority of the Board.<sup>5</sup> So the rules made under "the Bankruptcy, Ireland, Amendment Act, 1872," must be judicially noticed;<sup>6</sup> and the same law applies to the rules made by the Board of Trade under the Gas and Water Works Facilities Act, 1873,<sup>7</sup>—to those made either by Order in Council, or by the Committee of Council, under the Crown Office Act, 1877,<sup>8</sup>—to those made by the Lord Chancellor, under the Summary Jurisdiction Act, 1879,<sup>9</sup>—to those made by the Lord Chancellor with the assistance of the Registrar, under the Land Transfer Act, 1875,<sup>10</sup>—to those made under the Landlord and Tenant (Ireland) Act, 1870, either by the Court for Land Cases Reserved, or by the Privy Council in Ireland,<sup>11</sup>—and to those made by the Irish Land Commission under the Land Law (Ireland) Act, 1881.<sup>12</sup>

§ 20. It does not seem clear, whether or not the judges of the Supreme Court of Judicature are bound to notice who are the judges in inferior courts of record. The weight of American authorities is in favour of recognising them;<sup>13</sup> but the Court of Queen's Bench

<sup>1</sup> *Whitaker v. Wisby*, 12 Com. B. 56, 59.

<sup>2</sup> *Tregany v. Fletcher*, 1 Ld. Ray. 154.

<sup>3</sup> 46 & 47 V., c. 52, §§ 92, et seq.

<sup>4</sup> *Id.* § 127.

<sup>5</sup> *Bankruptcy Rules*, 1883, r. 257.

<sup>6</sup> 35 & 36 V., c. 58, § 124, Ir.

<sup>7</sup> 36 & 37 V., c. 89, § 14.

<sup>8</sup> 40 & 41 V., c. 41, §§ 3, 5.

<sup>9</sup> 42 & 43 V., c. 49, § 29.

<sup>10</sup> 38 & 39 V., c. 87, § 111.

<sup>11</sup> 33 & 34 V., c. 46, §§ 31, 41, Ir.

<sup>12</sup> 44 & 45 V., c. 49, § 50, subs. 2, Ir.

<sup>13</sup> *Hawks v. Kennebec*, 7 Mass. 461; *Ripley v. Warren*, 2 Pick. 592; *Despan v. Swindler*, 3 Mart. N. S. 705.

not very long ago refused to notice who was judge of the then Court of Review.<sup>1</sup> With regard to inferior courts of limited jurisdiction, the Supreme Court will not, unless when called upon to review their judgments,<sup>2</sup> take cognizance of the customs and proceedings therein,<sup>3</sup> except so far as they are regulated by statute.<sup>4</sup>

§ 21.<sup>5</sup> In all these and the like cases, where the memory of the judge is at fault, he resorts to such documents or other means of reference as may be at hand, and he may deem worthy of confidence.<sup>6</sup> Thus, if the point at issue be a date, the judge will refer to an almanac;<sup>7</sup> if it be the meaning of a word, to a dictionary;<sup>8</sup> if it be the construction of a statute, to the printed copy;<sup>9</sup> or, in case that appears to be incorrect, to the parliament roll.<sup>10</sup> In some instances, the judge has refused to take cognizance of a fact, unless the party calling upon him to do so could produce at the trial some document by which his memory might be refreshed; as was the case in *Van Omeron v. Dowick*,<sup>11</sup> where Lord Ellenborough declined to take judicial notice of the King's proclamation, the counsel not being prepared with a copy of the *Gazette* in which it was published. So, also, in *R. v. Withers*, tried before Mr. Justice Buller, in which case it became a material question to consider how far the prisoner owed obedience to his sergeant, and this depended on the articles of war, which were not produced at the trial, the judges thought that

<sup>1</sup> *Van Sandau v. Turner*, 6 Q. B. 773, 786.

<sup>2</sup> *Chitty v. Dendy*, 3 A. & E. 324; 4 N. & M. 842, S. C.

<sup>3</sup> *R. v. U. of Cambridge*, 2 Ld. Ray. 1334. In that case the Court refused to notice that the University Court in Cambridge proceeded according to the rules of the civil law. See, also, *Lane's case*, 2 Rep. 16 b. n. d; *Peacock v. Bell*, 1 Wms. Saund. 75; and *Dance v. Robson*, M. & M. 295.

<sup>4</sup> As in the case of the Court of the V.-Ch. of Oxford, which, under the Act of 17 & 18 V., c. 81, § 45, must now, in all matters of law, be governed by the common and statute law, and not by the rules of the civil law.

<sup>5</sup> Gr. Ev. § 6, as to first three lines.

<sup>6</sup> Gresl. Ev. 295.

<sup>7</sup> *Page v. Faucet*, Cro. El. 227. See *Tutton v. Darke*, 5 H. & N. 649.

<sup>8</sup> *Clementi v. Golding*, 2 Camp. 25.

<sup>9</sup> Since the commencement of the year 1866, a copy of the Public General Acts has been printed each year by Messrs. Eyre and Spottiswoode, as printers to the Queen, for the proprietors of the Law Journal, and has been published in the thirty-fifth and succeeding volumes of that excellent work.

<sup>10</sup> *R. v. Jeffries*, 1 Str. 446; *Spring v. Eve*, 2 Mod. 240.

<sup>11</sup> 2 Camp. 44.

they ought to have been produced.<sup>1</sup> But in many other cases, the courts have themselves made the necessary inquiries, and that, too, without strictly confining their researches to the time of the trial. Thus, to give but a few examples : in *Taylor v. Barclay*, where the question was, whether the federal republic of Central America had been recognised by the British Government as an independent state, the Vice-Chancellor sought for information from the Foreign Office ;<sup>2</sup> in *Chandler v. Grieves*, the Court of Common Pleas directed an inquiry to be made in the Court of Admiralty as to the maritime law ;<sup>3</sup> in *Doe v. Lloyd*, the same court caused an inquiry to be made by their officers, as to the practice of the Inrolment Office in the Court of Chancery ;<sup>4</sup> and in *Willoughby v. Willoughby*, Lord Hardwicke himself asked an eminent conveyancer respecting the existence of a general rule of practice in that branch of the profession.<sup>5</sup>

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<sup>1</sup> Cited by Buller, J., in *R. v. Holt*, 5 T. R. 446.

<sup>2</sup> 2 Sim. 221. See also *The Charkieh*, 42 L. J. Adm. 17.

<sup>3</sup> 2 H. Bl. 606, n. a.

<sup>4</sup> 1 M. & Gr. 685. The court in that case acted on the authority of *Worsley v. Filisker*, 2 Roll. R. 119.

<sup>5</sup> 1 T. R. 772. See, also, Sup. Ct. Rules, 1883, Ord. li. rr. 7, 8.



## CHAPTER III.

### HOW QUESTIONS OF FACT TRIED—FUNCTIONS OF JUDGE IN JURY TRIALS.

§ 21A. Trial by Jury,—an institution which, at least in a rudimentary form, may be traced back to the times of our Saxon ancestors—which optimists love to call “the sacred Palladium of British liberty,” and pessimists denounce as only less unwise than trial by battel, or even trial by ordeal—has, during the last half century, received some rude shocks. The first heavy blow aimed at it was in the year 1846, when the creation of our modern County Courts afforded to suitors an opportunity of determining for themselves whether their disputes should be settled by a single judge, or by the unanimous verdict of five jurors. An overwhelming majority in favour of the judge was the verdict pronounced by those parties, who were assuredly most interested in arriving at a sensible conclusion.<sup>1</sup> Some years, however, elapsed before the public became acquainted, through the medium of the Annual Parliamentary Returns, with these startling statistics. The seed was indeed sown, but much fell by the way-side, or in stony places, or among thorns, and it was only a small portion of the whole which was allowed to fructify. Still, by slow but sure degrees, doubts respecting the efficacy of “our inviolate bulwark” were bruited about, and those who had ears to hear heard the confused rumour of approaching change. The Common Law Commissioners in 1853<sup>2</sup> set forth very fairly the merits and demerits of trial by jury, and, in so

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<sup>1</sup> In the County Court Return, published in June, 1882, the following figures appear:—“Actions determined with a jury, 981; without a jury, 631,647.” No doubt a large number of the cases tried by the judge alone were for sums under 5*l.*, and in these cases a jury could not be summoned without leave; but say that three-fourths of the claims were of that character, (this being a liberal estimate), and the fact still remains that a jury was only called in one case out of 150, in which it might have been demanded at the instance of either litigant. The additional cost of a jury is, in the county courts, only 5*s.*

<sup>2</sup> Second Report, pp. 3—6.

doing, prepared men's minds for the wider adoption of the County Court mode of procedure.

§ 21b. It is not here intended to enumerate, in historial sequence the tentative changes that have been introduced with the above view;<sup>1</sup> but it will suffice to point out shortly at what stage they have at present arrived. And first, it must be borne in mind, that hitherto no attempt has been made to shake the nation's faith in trial by jury, as the best institution ever devised by the wit of man for protecting innocence when unjustly charged with the commission of crime. In criminal cases the party accused, whether by indictment or information, has still, as in the days of King John, the inalienable right to be tried "*per legale judicium parium suorum*;" and may the rash hand of Innovation never presume to touch that revered fabric, except so far as may tend to strengthen its foundations, and to enlarge its efficacy. In dealing with civil causes, however, the case is widely different; and here, it is not improbable, that we have scarcely as yet reached the limits of change, which the progress of law reform will force the country to adopt.

§ 21c. The present law on this subject, as it applies to civil actions, and is recognised in the High Court of Justice, will be found—if careful search be made for it—in Order XXXVI of the Rules of 1883.

The Rules run thus :—

"2. In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the plaintiff may, in his notice of trial to be given as hereinafter provided,<sup>2</sup> and the defendant may, upon giving notice within four days from the time of the service of notice of trial or within such extended time as the court or a judge may allow, or in the notice of trial to be given by him as hereinafter provided,<sup>3</sup> signify his

<sup>1</sup> See 17 & 18 V., c. 125, § 1; 38 & 39 V., c. 77, § 22; Rules of Sup. Ct., 1875, Ord. xxxvi. rr. 2, 3, 26, 27; 19 & 20 V., c. 102, § 4, Ir.; 13 & 14 V., c. 36, §§ 46—48, Sc.

<sup>2</sup> R. 11 of same Order.

<sup>3</sup> R. 12.

desire to have the issues of fact tried by a judge with a jury, and whereupon the same shall be so tried.

"8. Causes or matters assigned by the principal Act<sup>1</sup> to the Chancery Division shall be tried by a judge without a jury, unless the court or a judge shall otherwise order. (*Cardinal v. Cardinal*, L. R., 25 Ch. D. 772, where held by Pearson, J., that this Order should not be made, unless the case involves a simple issue of fact, and that it will not suffice to show that the action could be tried more quickly at the assizes. S. C. 53 L. J., Ch. 636.)

"4. The court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the principal Act,<sup>2</sup> could, without any consent of parties, have been tried without a jury.<sup>3</sup>

"5. The court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury.

"6. In any other cause or matter, upon the application of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury.

"7. (a.) In every cause or matter, unless under the provisions of Rule 6 of this Order, a trial with a jury is ordered, or under

<sup>1</sup> 36 & 37 V., c. 66, § 34, gives the following list. All causes and matters in respect to which any Act has given exclusive jurisdiction to the Court of Chancery, or to any judge of that court, *e. g.*, matters relating to lunatics, or charities; and next,

"All causes and matters for any of the following purposes:—

The administration of the estates of deceased persons;

The dissolution of partnerships, or the taking of partnership or other accounts;

The redemption or foreclosure of mortgages;

The raising of portions, or other charges on land;

The sale and distribution of the proceeds of property subject to any lien or charge;

The execution of trusts, charitable or private;

The rectification, or setting aside, or cancellation of deeds or other written instruments;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;

The partition or sale of real estates;

The wardship of infants, and the care of infants' estates."

<sup>2</sup> 5th Aug., 1873.

<sup>3</sup> *E. g.*, "where matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way"; 17 & 18 V., c. 125, § 3.

Rule 2 of this Order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury ; provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors :

“(b.) The plaintiff in any cause or matter in which he is entitled to a jury may have the issues tried by a special jury, upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial :

“(c.) The defendant, in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, on giving notice in writing to that effect at any time after the close of the pleadings or settlement of the issues and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given :

“(d.) Provided that a judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just.

“8. Subject to the provisions of the preceding Rules of this Order, the court or a judge may, in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others.

“9. Every trial of any question or issue of fact with a jury shall be by a single judge, unless such trial be specially ordered to be by two or more judges.

“10. Nothing in this Order shall affect any proceedings under any of the provisions of the Common Law Procedure Acts relating to arbitration.”

§ 21b. On a critical examination of these Rules,—which it must be admitted have been framed by a draughtsman who had no clear idea of what he was undertaking,—it will be seen, 1st, that in most cases coming before the Chancery Division, the litigants have no

longer any power to demand the attendance of jurors, but the issues will be tried without a jury, unless the court or a judge otherwise orders; and next, that actions brought and other matters<sup>1</sup> pending in the Common Law Division must now be tried by the judge sitting alone, unless one or other of the parties has signified his desire, either by notice to his opponent in some particular cases,<sup>2</sup> or by application to the court in others,<sup>3</sup> that a jury should be summoned; or unless a special order has been given by the court or a judge, that the matter should be tried "by a judge with a jury, or by a judge sitting with assessors, or by an official referee, or special referee, with or without assessors."<sup>4</sup> In a few instances referred to in Rules 4 and 5 the court or a judge is empowered to exclude the intervention of a jury, even though both litigants are desirous of adopting that mode of trial.

§ 21*r*. As the Rules just cited,—besides having no effect either in criminal proceedings, or in proceedings on the Crown or Revenue side of the Queen's Bench Division,—are also inapplicable "in proceedings for divorce or other matrimonial causes,"<sup>5</sup> it will here be convenient to state, that, by virtue of a Rule made in July, 1880,<sup>6</sup> for divorce and matrimonial causes, if damages be not claimed, the cause is heard by oral evidence before the court without a jury, and if damages be claimed, the cause is tried before the court with a common jury; but in either case any party may apply by summons for a direction that the cause be heard or tried in a different manner.

§ 22. With respect to trial by jury, Lord Hardwicke has § 2*r*  
observed,—and all reflecting men will agree in the observation,—that "it is of the greatest importance to the law of England, and to the subject, that the powers of the judge and jury be kept distinct;" yet, important as this object undoubtedly is, it is one which, even at the present day, is not very perfectly effected. The

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<sup>1</sup> See R. 7 (a), cited ante, p. 31. Thus an interpleader may now be tried without a jury in the Sup. Ct., notwithstanding *Hamlyn v. Betteley*, 50 L. J., Q. B. 1.      <sup>2</sup> R. 2.      <sup>3</sup> R. 6.      <sup>4</sup> R. 7 (a).

<sup>5</sup> Ord. lxviii., r. 1.

<sup>6</sup> Rules in Div. and Mat. Causes, R. 205.

3 LAW OF EVID.—V. I. (2899)

general principle, that the judge must determine the law, and the jury the fact, is not, and cannot be disputed;<sup>1</sup> but in the applica-

<sup>1</sup> In *R. v. The Dean of St. Asaph*, *Ld. Mansfield* declared, "that the fundamental definition of trial by jury depended upon the universal maxim, *ad quæstionem juris non respondent iuratores; ad quæstionem facti non respondent iudices;*" and his lordship added—"Where a question can be proved by the form of pleading, the distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court; when, by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law: they are not sworn to decide the law; they are not required to decide the law. . . . It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in *their power* to do wrong, which is a matter entirely between God and their own consciences." 21 *How. St. Tr.* 1039, 1040. So, in an elaborate essay on this subject, published by Mr. Hargrave, as a note to 1 *Co. Litt.* 155 b., the learned author states the result to be, "that the *immediate* and *direct* right of deciding upon questions of law is intrusted to the judges; that in a jury it is only *incidental*; that in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and, therefore, that in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of judges." In America, the same principles have been expounded, in forcible language, by Mr. Justice Story. "The learned counsel for the prisoner," said he, "contends that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each, they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the Court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial, or a writ of error, as the

tion of this principle at Nisi Prius, embarrassing questions not unfrequently arise, from the experienced difficulty of defining with clearness the obscure and shifting boundaries of law and fact. In the present chapter it is proposed briefly to discuss this subject, and to lay down such general rules, as may practically be of use in distinguishing the relative duties of judges and jurors.

§ 23. The duty of a judge presiding at a trial by jury is four-  
fold;—First, he must decide all questions respecting the admissi-  
bility of evidence; secondly, he must instruct the jury in the rules  
of law, by which the evidence, when admitted, is to be weighed;  
thirdly, he must determine, as a legal question, whether there be  
any evidence fit to be submitted to the jury for their consideration;  
and lastly, he must explain and enforce those general principles of  
law, that are applicable to the point at issue.<sup>1</sup> In discharging the  
first duty, it frequently happens that the admissibility of a witness  
or an instrument is found to depend on a disputed fact, in which  
case all the evidence adduced both to prove and disprove that fact  
must be received by the judge, and adjudicated on by him *alone*.<sup>2</sup>  
Thus, for example,—if the question be whether a confession should  
be excluded on account of some previous threat or promise, the  
judge must decide, first, whether the threat or promise was really  
nature of the jurisdiction of the particular court may require. Every person  
accused as a criminal has a right to be tried according to the law of the land,  
the fixed law of the land; and not by the law as a jury may understand it,  
or choose, from wantonness, or ignorance, or accidental mistake, to interpret  
it. If I thought that a jury were the proper judges of the law in criminal  
cases, I should hold it my duty to abstain from the responsibility of stating  
the law to them upon any such trial. But believing, as I do, that every  
citizen has a right to be tried by the law, and according to the law,—that it  
is his privilege and truest shield against oppression and wrong,—I feel it my  
duty to state my views fully and openly on the present occasion." U. S. v.  
Battiste, 2 Sumn. 243. See further, on this interesting subject, 2 Wynne's  
Ennomus; Bushell's case, 6 How. St. Tr. 999, 1008, 1013, 1014; Vaugh.  
135, S. C.; Franklin's case, 17 How. St. Tr. 625; and R. v. Woodfall, 5  
Burr. 2661.

<sup>1</sup> Among the questions propounded by the Irish Parliament to the judges  
of that country in 1641, was one, "whether the judge or jurors ought to be  
judge of the matters of fact," to which the judges replied, that, "although  
the jurors be the sole judges of matter of fact, yet the judges of the court  
are judges of the *validity of the evidence*, and of the *matters of law arising out*  
of the same, wherein the jury ought to be guided by them." 2 Nelson's  
Coll. of State Pap. 575, 582, Lond. 1683.

<sup>2</sup> Bartlett v. Smith, 11 M. & W. 486.

made; and, secondly, whether, if made, it was sufficient in law to warrant the exclusion of the evidence.<sup>1</sup> So, if a dying declaration be tendered in evidence, and its admissibility rest upon the fact that the deceased believed, when he made it, that he was on the point of death, the question whether this fact be satisfactorily proved must be determined by the judge.<sup>2</sup> So, where the receipt in evidence of a deposition depends on the inability of the deponent to attend the trial, the sickness of the witness or other special cause disabling him from attendance must be proved to the satisfaction of the judge.<sup>3</sup> So, the judge alone must decide, whether the declarant in a question of pedigree has been proved to be a deceased member of the family; and it makes no difference in applying this rule, that the relationship of the declarant happens to be the very question at issue in the cause.<sup>4</sup> So, if proof be offered of the signature of an attesting witness, and the admissibility of this evidence turns on the fact, whether or not the witness has absented himself from the trial by collusion with the opposite party, the judge must decide on the existence of this fact.<sup>5</sup> In like manner, if the question be whether a document has been duly executed, or stamped;<sup>6</sup> or whether it comes from the right custody;<sup>7</sup> or whether sufficient search has been made for it to admit secondary evidence of its contents;<sup>8</sup> or whether notice to produce it has been duly served;<sup>9</sup> or whether, in the event of its being produced under notice, it be the original paper required;<sup>10</sup> or whether it is protected

<sup>1</sup> See 1 Stark. R. 523, n. b.

<sup>2</sup> So resolved by all the judges, in two cases cited by Parke, B., in *Bartlett v. Smith*, 11 M. & W. 486; and in one case cited by Ld. Ellenborough, in *R. v. Hucks*, 1 Stark. R. 523. These cases virtually overrule *R. v. Woodcock*, 1 Lea. 504, where the question was left to the jury by Eyre, C. B.

<sup>3</sup> *D. of Beaufort v. Crawshay*, 1 Law Rep., C. P. 699; 35 L. J., C. P. 342, & 1 H. & R. 638, S. C.

<sup>4</sup> *Doe v. Davies*, 10 Q. B. 314. See *Hitchins v. Eardley*, 2 Law Rep., P. & D. 248; 40 L. J., Pr. & Mat. 70, S. C.

<sup>5</sup> *Egan v. Larkin*, 1 Arm., M. & O. 403, per Brady, C. B.

<sup>6</sup> *Bartlett v. Smith*, 11 M. & W. 483; *Dunsford v. Curlewis*, 1 Fost. & Fin. 702, per Hill, J. See *Stowe v. Querner*, 5 Law Rep., Ex. 155; 39 L. J., Ex. 60, S. C.

<sup>7</sup> *Bp. of Meath v. M. of Winchester*, 3 Bing. N. C. 198; *Doe v. Keeling*, 11 Q. B. 889, per Ld. Denman. <sup>8</sup> 11 M. & W. 486, per Alderson, B.

<sup>9</sup> *Harvey v. Mitchell*, 2 M. & Rob. 366, per Parke, B.

<sup>10</sup> *Froude v. Hobbs*, 1 Fost. & Fin. 612, per Byles, J.; *Boyle v. Wiseman*, 11 Ex. R. 360; overruling *Jones v. Fort*, M. & M. 196.



as being a confidential communication;<sup>1</sup> or if a witness be objected to on the ground of unripeness or imbecility of mind;—in all these and the like cases the preliminary question of admissibility must, in the first instance, be exclusively decided by the judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses, in order to arrive at a just conclusion.

§ 24. So, where evidence is offered of acts done in places other § 22  
than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in these different localities as to render evidence affecting the one admissible with reference to the other, and he will be further called upon to pronounce whether the acts relied on amount to evidence of ownership.<sup>2</sup> Where witnesses were called to prove a general usage in trade, the judge, thinking that their testimony amounted to no more than evidence of opinion, withdrew it from the consideration of the jury, and the court supported his ruling.<sup>3</sup> It was then laid down, as a distinct principle, that where the evidence was by law admissible for the determination of the point raised, the judge was bound to lay it before the jury; but whether the evidence was admissible or not, was a matter for the decision of the judge alone. In all these cases, however, after the evidence has been finally admitted, its credibility and weight are entirely questions for the jury, who are at liberty to consider all the circumstances of the case, including those already proved before the judge, and to give the evidence such credit only as, upon the whole, they may think it deserves.<sup>4</sup> The judge merely decides whether there is, *prima facie*, any reason for presenting it at all to the jury; and his decision on this point, if erroneous, may be reviewed by the court above.<sup>5</sup>

§ 25. Secondly, it is the duty of the judge to point out to the § 23 +

<sup>1</sup> *Cleave v. Jones*, 7 Ex. R. 421.

<sup>2</sup> *Doe v. Kemp*, 7 Bing. 336, per Bosanquet, J.

<sup>3</sup> *Lewis v. Marshall*, 7 M. & Gr. 743, 744.

<sup>4</sup> *Welstead v. Levy*, 1 M. & Rob. 139, per Parke, J.; *Doe v. Davies*, 10 Q. B. 324, per Ld. Denman; *Ross v. Gould*, 3 Greenl. 204.

<sup>5</sup> *Cleave v. Jones*, 7 Ex. R. 421.

jury any rule of law, which either renders evidence unnecessary, or gives peculiar weight to any particular species of evidence, or defines the manner in which a certain fact must be proved. Thus, he should distinctly explain the nature of any presumptions, which may apply to the point at issue, distinguishing such as are conclusive from those which are liable to be rebutted by counter evidence; and again, dividing this latter class into those presumptions upon which the jury are bound to act, in the absence of conflicting testimony, and those upon which it is expedient, or allowable, to rely. So, if by the common or statute law any document, when proved, becomes conclusive evidence of the facts stated therein, it is the province of the judge to point out to the jury that the existence of such facts cannot be disputed or denied, and that the only question for their deliberation is, whether or not the document be duly proved. So, if the uncorroborated testimony of a single witness be insufficient by law to establish guilt, as, for instance, in charges of treason or perjury, the judge must acquaint the jury with the nature and extent of this rule; and even where a conviction founded upon such testimony would be strictly legal, as in the case of an accomplice becoming witness for the Crown, the judge would not properly discharge his duty, if he did not warn the jury against the danger of placing implicit reliance upon statements coming from such a suspicious quarter. Many judges, indeed, and those of the greatest ability, have not confined their observations within these limits, but have boldly given their opinions respecting the matters of fact; and although this mode of proceeding, when adopted, as it sometimes has been, in a supercilious spirit, may arouse the jealous feelings of a jury, and may excite them, in their anxiety to prove their independence, to pronounce an unjust verdict;<sup>1</sup> yet it may well be doubted whether, in the great majority of instances, it would not promote the real interests of justice, if the judge were temperately to state to the jury what opinions he had formed respecting the merits of the case, and the mode by which he had

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<sup>1</sup> "Few things incite me more to repel a doctrine than intolerant attempts to force it on my understanding." See Dr. Channing's Work, vol. iii. p. 319. *Ld. Bacon*, in his advice to *Hutton, J.*, says, "You should be a light to jurors to open their eyes, but not a guide to lead them by their noses." *Bac. Works*, vol. vii. p. 271, ed. *Montagu*.

arrived at his conclusions. The jury would still have the undisputed power of deciding the question as they thought fit; but they would have the advantage of being advised by a man no more liable than themselves to prejudice or partiality, whose long experience in courts of justice must of necessity have rendered him far more competent than they can be to unravel the tangled threads of conflicting testimony. The too common mode of summing up,—“Gentlemen, if you think so and so, you will find for the plaintiff, if you think otherwise, you will find for the defendant; gentlemen, the question is for you,”—though sanctioned by the practice of many able, but somewhat lazy judges, and though possibly in accordance with the strict theory of a trial by jury, is but little calculated to promote the attainment of truth; and in complicated cases before a petty jury, is almost tantamount, if not to a direct denial of justice, at least to a decision of the issue by lot.

§ 25A. Thirdly, the judge must, at the close of each case, determine whether *any* evidence has been given on which the jury can *properly* find the question for the party on whom the onus of proof lies; and if no such evidence exists, he ought to withdraw the question from the consideration of the jury, and direct, either a non-suit to be entered if the onus be on the plaintiff, or a verdict to be found if the onus be on the defendant.<sup>1</sup> It is not always easy to act upon this somewhat vague rule, and the matter will not be much simplified by substituting for the language here employed—as some learned judges have sought to do—other indefinite phraseology to convey the same idea. To say that a judge should withdraw the case from the jury, unless there be *reasonable* evidence on which *reasonable* men could *reasonably* or *fairly* find a verdict, leaves the rule pretty much as above stated;<sup>2</sup> and in practice, each judge must, and can only, be guided by such good sense and discretion as he can bring to bear upon each trial. Still,

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<sup>1</sup> *Ryder v. Wombwell*, 4 Law Rep., Ex. 32; 38 L. J., Ex. 8, S. C.; approved of and adopted in *Metrop. Ry. Co. v. Jackson*, L. R., 3 App. Cas. 193, 207; and in *Dubl. W. & W. Ry. Co. v. Slattery*, L. R., 3 App. Cas. 1155, per *Ld. Hatherley*, p. 1171, and per *Ld. Blackburn*, pp. 1208, 1209.

<sup>2</sup> See *Dublin W. & W. Ry. Co. v. Slattery*, L. R., 3 App. Cas. 1197, 1198, per *Ld. Coleridge*.

he will probably not often go astray if he determines in every *doubtful* case to take the opinion of the jury, and to leave the question, as to how far he was justified in thus acting, to be decided thereafter by the court. Thus much, however, may be safely laid down for the guidance of the judge, that, whenever there is conflicting evidence on a question of fact, he *must* leave the consideration of it for the decision of the jury, whatever his own opinion may be respecting its weight.<sup>1</sup>

§ 26. Lastly, the judge must explain to the jury what principles of law are applicable to the point in issue, and in order to enable him to do so correctly, he must distinguish questions of law from questions of fact. This, in ordinary cases, is no difficult task. Thus, for instance, on a charge of larceny, the judge lays down, as a general proposition of law, that all persons who take and remove the personal chattels of another without his consent, and with a felonious intent, are guilty of that crime; and then, according to the circumstances of the case, he explains, with more or less particularity, what constitutes a taking, removing, &c. These, obviously, are questions of law, and together form the major premiss of the syllogism. The jury next decide whether the evidence proves that the goods have been taken and removed in such a manner, and with such an intent, as the judge has previously shown will amount to larceny. These are questions of fact, and together form the minor premiss. Lastly comes the conclusion of guilt or innocence, which may either be drawn by the jury applying to the facts which *they* find, the rules of law as interpreted by the judge; or, in the event of their considering this task too difficult for them, they are at liberty to find the facts specially, but not the *mere evidence* on which the facts are founded,<sup>2</sup> leaving the court to apply the law to such facts, and consequently to pronounce the final decision. But simple as this process appears to be, the line between

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<sup>1</sup> Dublin W. & W. Ry. Co. v. Slattery, L. R., 3 App. Cas. 1155, per Dom. Proc. Ir. See also Metrop. Ry. Co. v. Jackson, L. R., 3 App. Cas. 193, 197; and 47 L. J., C. P., 303, 305, S. C. in Dom. Proc., cited post, § 37, n.<sup>4</sup>

<sup>2</sup> Hubbard v. Johnstone, 3 Taunt. 209, per Wood, B.; Harwood v. Goodright, 1 Cowp. 91, 92, per Ld. Mansfield; Mires v. Solebay 2 Mod. 244, 245; 1 St. Ev. 511, 512.

law and fact has been very indistinctly drawn in a certain class of cases, and in these cases, therefore, the respective duties of the judge and jury are not yet clearly defined. For instance, if the question be whether a certain party had probable cause for doing an act, or whether he has done an act within a reasonable time, or with due diligence, it is difficult to say whether the definition of what constitutes probable cause, reasonable time, or due diligence, be for the judge or the jury, and specious arguments will not be wanting in favour of the claims of either party. On the one hand, it may be said, that these terms are as capable of judicial interpretation as the words conversion, or asportation, which must clearly be explained by the judge; while, on the other hand, it may be urged, that they seem rather addressed to the practical experience of practical men, than to the legal knowledge of the mere lawyer; that, being terms of degree, their meaning is subject to indefinite fluctuation, according to the varying circumstances of each particular case, and that consequently they defy all attempts to compress them within exact *à priori* definitions. In truth, they are neither matters of fact, nor matters of law, exclusively, but are rather matters of quality or opinion, which, for want of a more appropriate name, have been generally termed "mixed cases." They form, in logical phrase, the middle term, and are alike common to both the premisses, which are respectively intrusted to the judge and jury, and upon which the ultimate decision must proceed.<sup>1</sup>

§ 27. Having said thus much respecting the general nature of § 25 this class of cases, it remains to be seen what decisions have been reported on the subject; and although some of these will be found to rest rather on arbitrary authority than on any definite principle of law, it is hoped that their collection and partial classification may be of some service, the more especially as precedents have ever been considered in this country as deservedly entitled to respect.

§ 28. First: It is now clearly established,—albeit the wisdom of § 26 the rule has been stoutly disputed,<sup>2</sup>—that the question of *probable*

<sup>1</sup> See, on this difficult subject, 12 Law Mag. 53—74; 1 St. Ev. 512—526.

<sup>2</sup> *Lister v. Perryman*, 4 Law Rep., H. L. 521; 39 L. J., Ex. 177, S. C. See *Hicks v. Faulkner*, 51 L. J., Q. B. 268.

*cause* must be decided exclusively by the judge, and that the jury can only be permitted to find whether the facts alleged in support of the presence or absence of probability, and the inferences to be drawn therefrom, really exist.<sup>1</sup> For instance, in an action for a malicious prosecution, the jury, provided the evidence on the subject be conflicting, may be asked whether or not the defendant, at the time when he prosecuted, *knew* of the existence of those circumstances which tend to show probable cause, or *believed* that they amounted to the offence which he charged; and if they negative either of these facts, the judge will decide as a point of law, that the defendant had no probable cause for instituting the prosecution.<sup>2</sup> This rule,—which is based on the assumption that judges are far more competent than juries to determine the question how far it may have been proper for a person to have instituted a prosecution,<sup>3</sup>—is equally binding, however numerous and complicated the facts and inferences may be; <sup>4</sup> for, although in some cases it would doubtless be attended with great difficulty to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all, or some only of the facts and inferences

<sup>1</sup> *Michell v. Williams*, 11 M. & W. 205; *Panton v. Williams*, 2 Q. B. 169; 1 G. & D. 504, S. C.; *Hailes v. Marks*, 30 L. J., Ex. 389; 7 H. & N. 56, S. C.; *Sutton v. Johnstone*, 1 T. R. 493, 510, 544, 545, 547, 784; 1 Br. P. C. 76, 2nd ed., S. C., in Dom. Proc.; *Mitchell v. Jenkins*, 5 B. & Ad. 594—596; *Hinton v. Heather*, 14 M. & W. 134, per Alderson, B.; *West v. Baxendale*, 9 Com. B. 141.

<sup>2</sup> *Turner v. Ambler*, 10 Q. B. 252. The absence, however, of belief must be proved by the plaintiff, and cannot be inferred from the mere fact that the defendant had made use of the charge for an unfair purpose, *id.* See, also, *Broad v. Ham*, 5 Bing. N. C. 722; *Haddrick v. Healop*, 12 Q. B. 274—277; *Heslop v. Chapman*, 23, L. J., Q. B. 49.

<sup>3</sup> *Fraser v. Hill*, 1 Macq. Sc. Cas. H. of L. 398, per Ld. Cranworth.

<sup>4</sup> In *Panton v. Williams*, 2 Q. B. 192, Tindal, C. J., observes, "Upon this bill of exceptions we take the broad question between the parties to be this: whether, in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, that if they find the facts proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. And we are all of opinion that it is the duty of the judge so to do." See *Rowlands v. Samuel*, 11 Q. B. 41, n.; *Douglas v. Corbett*, 6 E. & B. 514.

from facts are made out to their satisfaction, yet the task is not impracticable ; and it would obviously savour of gross inconsistency to hold that a rule, which is undisputed in a simple case, should not equally apply where the facts were complicated.<sup>1</sup> For where could the line be drawn, and who should determine what degree of complexity would transfer the burthen of decision from the judge to the jury? The difficulty, too, is more apparent than real, for it rarely happens but that some leading facts exist in each case, which present a broad distinction to the view, without having recourse to the less important circumstances ;<sup>2</sup> and as the judge has a right to act upon all the uncontradicted facts, it is only where some doubt is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that he is called upon to submit any question to the jury.<sup>3</sup>

§ 29. Although the rule is as above stated, where in an action § 27  
on the case for malicious prosecution the question of probable cause arises, it has been held, both in England and Ireland, that in an action of trespass, the *reasonableness of the belief or suspicion*, upon which a party acts in causing an arrest or in detaining goods, is a question which the jury may be called upon to decide.<sup>4</sup> Thus, if a magistrate, on being sued for false imprisonment, were to rely, under not guilty by statute, upon want of notice of action or the like, the question whether he believed, with some colour of reason, and *bona fide*, that he was acting in pursuance of his lawful authority, so as to entitle him to the protection of the statute, would, in strictness, be for the jury to determine under all the circumstances, if the plaintiff should desire their opinion to be taken on the evidence ; though if, as is commonly the case, these questions were first submitted to the judge on an application for a nonsuit, and the plaintiff did not then desire them to be left to the

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<sup>1</sup> *Panton v. Williams*, 2 Q. B. 194, 195, per Tindal, C. J., pronouncing the judgment of the Ex. Ch.

<sup>2</sup> *Id*

<sup>3</sup> *Michell v. Williams*, 11 M. & W. 216, 217, per Alderson, B.

<sup>4</sup> *Wedge v. Berkeley*, 6 A. & E. 663 ; 1 N. & P. 665, S. C. ; *Annett v. Osborne*, 2 Jebb & Sy. 376 ; *Hazeldine v. Grove*, 3 Q. B. 997 ; 3 G. & D. 210, S. C. ; *Hughes v. Buckland*, 15 M. & W. 346.

jury, he would be bound by the decision of the judge, if the court should think it warranted by the evidence.<sup>1</sup>

§ 30. The question of *reasonable time* is open to more doubt than that of probable cause. With respect to some subjects, indeed, which from their frequent recurrence admit of the adoption of precise rules as to what constitutes reasonable time, the courts, for the sake of commercial convenience, have laid down such rules; and in these cases the duty of the jury is clearly confined to the simple task of ascertaining whether the facts proved fall within the rules or not. Thus, notice of dishonour of a bill of exchange must be given within a reasonable time, and this has been held<sup>2</sup> by the judges<sup>3</sup> to mean,—according as the parties live in the same or in different places,—either that the letter containing notice should be so posted that in the due course of delivery it would arrive on the day following that on which the writer has received intelligence of dishonour;<sup>4</sup> or that such letter should be posted before the departure of the mail on the day following the receipt of intelligence;<sup>5</sup> or if there be no post on that day,<sup>6</sup> or if it start at an unreasonable hour in the morning,<sup>7</sup> then the writer shall have an additional day. If, too, the bill be presented through a banker, one day more is allowed for giving notice of dishonour than if it were presented by the party himself.<sup>8</sup> At one time a doubt seems to have been entertained whether, in the event of there being several indorsers to a bill, the holder would have a separate day allowed him for giving notice to each; but it is now expressly decided that

<sup>1</sup> *Hazeldine v. Grove*, 3 Q. B. 997, 1007; 3 G. & D. 210, S. C. See post, § 38.

<sup>2</sup> See, now, 45 & 46 V., c. 61, § 49, subs. 12, which codifies the law as stated in the text.

<sup>3</sup> See *Hirschfield v. Smith*, 1 H. & R. 284, 288, per Erle, C. J.

<sup>4</sup> *Stocken v. Collin*, 7 M. & W. 515; *Smith v. Mullett*, 2 Camp. 208, per Ld. Ellenborough; *Hilton v. Fairclough*, id. 633, per Lawrence, J.; *Rowe v. Tipper*, 13 Com. B. 256, per Maule, J.

<sup>5</sup> *Williams v. Smith*, 2 B. & A. 496. See *Shelton v. Braithwaite*, 7 M. & W. 436.

<sup>6</sup> *Geill v. Jeremy*, M. & M. 61, per Ld. Tenterden.

<sup>7</sup> *Hawkes v. Salter*, 4 Bing. 715; 1 M. & P. 750, S. C.; *Bray v. Hadwen*, 5 M. & Sel. 68; *Wright v. Shawcross*, 2 B. & A. 501, n.

<sup>8</sup> *Alexander v. Burchfield*, 7 M. & Gr. 1066, 1067, per Tindal, C. J.; *Haynes v. Birks*, 3 B. & P. 599; *Scott v. Lifford*, 9 East, 347; 2 Camp. 246, S. C.; *Langdale v. Trimmer*, 15 East, 291. See 45 & 46 V., c. 61, § 49, subs. 13.



he has in general but one day to give notice to all the parties against whom he intends to enforce his remedy, though each of the indorsers in turn has *his day*,<sup>1</sup> and though the holder may avail himself of a notice duly given by any other party to the bill.<sup>2</sup> Again, the holder of a cheque, or of a bill or note payable on demand, must, in general, present the instrument for payment on or before the day following that on which it was received;<sup>3</sup> but in these cases, the term "reasonable time" may sometimes receive a different construction, regard being had to the nature of the instrument, the usage of trade, and the particular facts.<sup>4</sup>

§ 31. This last rule applies, not only as between the parties to a cheque,<sup>5</sup> but as between banker and customer, unless circumstances exist from which a contract or duty on the part of the banker to present at an earlier, or to defer presentation to a later period, can be inferred.<sup>6</sup> But the rule does not apply to cases where the action is brought by the holder of a banker's cheque against the drawer, unless during the delay the fund has been lost, as by the failure of the banker.<sup>7</sup> When the rule is applicable, it matters not, so far as the liability of the drawer is concerned, whether the instrument be presented for payment by the party himself or by his banker; and, therefore, when an uncrossed cheque, given to a gentleman on the 10th of March, was paid into his bankers' on the 11th, and was presented by them on the 12th to the bankers on whom it was drawn, and who had stopped payment early in the morning, the court held that the payee could not recover the amount of the cheque from the drawer as the presentment for payment had not been made

<sup>1</sup> *Rowe v. Tipper* 13 Com. B. 249; *Dobree v. Eastwood*, 3 C. & P. 250. See, however, *Gladwell v. Turner*, 39 L. J., Ex. 31; 5 Law Rep., Ex. 59, S. C.

<sup>2</sup> *Chapman v. Keane*, 3 A. & E. 193; 4 N. & M. 607, S. C.; *Rowe v. Tipper*, 13 Com. B. 256, per Jervis, C. J.

<sup>3</sup> *Rickford v. Ridge*, 2 Camp. 539; *Boddington v. Schlenker*, 4 B. & Ad. 762; *Moule v. Brown*, 4 Bing. N. C. 266. See *Bailey v. Bodenham*, 16 Com. B., N. S. 288; 33 L. J., C. P. 252, S. C.

<sup>4</sup> 45 & 46 V., c. 61, §§ 45, subs. 2; 74, subs. 2; and 86, subs. 2.

<sup>5</sup> See *Hopkins v. Ware*, 4 Law Rep., Ex. 268.

<sup>6</sup> *Hare v. Henty*, 30 L. J., C. P. 302; 10 Com. B., N. S. 65, S. C. See *Prideaux v. Criddle*, 4 Law Rep., Q. B. 455; 38 L. J., Q. B. 232; 10 B. & S. 515, S. C.

<sup>7</sup> *Robinson v. Hawksford*, 9 Q. B. 52; *Serle v. Norton*, 2 M. & Rob. 401, per *Ld. Abinger*, 404, n. a; *Laws v. Rand*, 27 L. J., C. P. 76; 3 Com. B., N. S. 442, S. C. Here no time less than six years is deemed unreasonable.

within a reasonable time, and the bankers at the time of their failure had sufficient funds of the drawer's to pay the cheque.<sup>1</sup> Had the payee in this case stipulated that his bankers' names should be crossed upon the cheque, or had the drawer discounted his cheque in the country, the result would have been otherwise, for the drawer would then have been considered as agreeing to the arrangement that the necessary course of presentment through a banker should be observed, and the steps actually taken were clearly in conformity with such course.<sup>2</sup>

§ 32. The judges have also, with respect to the presentment of bills for payment, taken upon themselves to decide, as a question of law, what constitutes *reasonable hours*, and have held that if an instrument be payable at a banker's, it must be presented within banking hours;<sup>3</sup> if elsewhere, at any time when the drawer may be expected to be found at his place of residence or business, though it be as late as eight or nine o'clock in the evening.<sup>4</sup> If, indeed, the banker appoints a person to attend at the office after banking hours for the purpose of returning an answer to a presentment, and such person does return an answer before midnight, no objection can be taken to the unreasonableness of the hour when the presentment was made;<sup>5</sup> and the same rule would seem to prevail if the bill be *personally presented* to the acceptor before twelve o'clock at night on the day that it falls due.<sup>6</sup> So, a demand or tender of rent *on the land* must, in order to create or avoid a forfeiture, be made before sunset, this being a rule of convenience adopted by the law to prevent the necessity of one party waiting for the other till midnight. But if the tenant actually meet the lessor, either on or off the land, *at any time* of the last day of payment, and tender the rent, it will be sufficient,

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<sup>1</sup> Alexander v. Burchfield, 7 M. & Gr. 1061.

<sup>2</sup> Id., 1066, 1067, per Tindal, C. J. See 45 & 46 V., s. 61, §§ 46—82; and Heywood v. Pickering, 9 Law Rep., Q. B. 428; 43 L. J., Q. B. 145, S. C.

<sup>3</sup> Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 M. & Sel. 28.

<sup>4</sup> Wilkins v. Jadis, 2 B. & Ad. 188; 1 M. & Rob. 41, S. C.; Jameson v. Swinton, 2 Taunt. 224; Barclay v. Bailey, 2 Camp. 527, per Ld. Ellenborough. <sup>5</sup> Garnett v. Woodcock, 6 M. & Sel. 44; 1 Stark. B. 475, S. C.

<sup>6</sup> See 6 M. & Gr. 624—626 per Parke, B.

provided there was time before midnight to receive and count the money tendered.<sup>1</sup>

§ 33. The law as to delivery of goods within reasonable hours § 29 was much discussed in the case of *Startup v. Macdonald*.<sup>2</sup> There the defendant had agreed to purchase certain oil of the plaintiffs, to be delivered within the last fourteen days of March, and the action was brought for not accepting it according to the contract. The defence was that the oil was tendered on the 31st March at nine at night, which was an unreasonable hour. The jury found by a special verdict that the oil was tendered at half-past eight at night on a Saturday; that there was full time for the plaintiffs to have delivered, and for the defendant to have examined, weighed, and received the whole before Sunday morning; but that the time of tendering was unreasonably late. Upon this verdict the Court of Common Pleas gave judgment for the defendant; but the judges of the Exchequer Chamber (Lord Denman *dissentiente*) reversed the decision. Mr. Justice Patteson observed, "It may be conceded that the defendant was not bound to be on his premises ready to receive the oil after the usual hours of business; and if he had gone away, and the plaintiffs had afterwards come, and been unable to make a personal tender, they must have suffered for their delay; but as the defendant *did* wait, and as the tender *was* made in time to complete the delivery within the time specified, the unreasonableness and impropriety of the time, whatever those words mean, form no answer to the action for not accepting the oil."<sup>3</sup> Mr. Baron Alderson used language to the same effect,<sup>4</sup> and thus laid down the general rule:—"Wherever, in cases not governed by peculiar customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day to perform their obligation. The only qualification that I am aware of to this rule is, that in acts requiring time in order that they may be

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<sup>1</sup> *Startup v. Macdonald*, 6 M. & Gr. 619, 620, per Patteson, J.; 622, per Alderson, B.; 625, 626, per Parke, B.

<sup>2</sup> 6 M. & Gr. 593, in Ex. Ch., reversing the judgment of the Court below, as reported in 2 M. & Gr. 395; and in 2 Scott, N. R. 495.

<sup>3</sup> 6 M. & Gr. 620.

<sup>4</sup> *Id.* 621, 622.

completely performed, the party must, at all events, tender to do the act at such period before the end of the last day, as, if the tender be accepted, will leave him sufficient time to complete his performance before the end of that day. In the case of a mercantile contract, however, the opposite party is not bound to wait for such tender of performance beyond the usual hours of mercantile business, or at any other than the usual place at which the contract ought to be performed. The party, therefore, who does not make his tender at that usual place, or during those usual hours, runs a great risk of not being able to make it at all. In this case the plaintiffs have had the good fortune to meet with the defendant, and to make a tender to him in sufficient time. And I think, under these circumstances, that the defendant was bound to accept the goods, and is liable in damages for not accepting them."<sup>1</sup>

§ 34. Again, a reasonable notice to quit a yearly tenancy has for centuries received a legal construction, as meaning a six calendar months' notice,<sup>2</sup> to terminate at the expiration of the current year:<sup>3</sup> and when the tenant holds different portions of the premises from different days, it has been further decided, that the notice refers to the day of entry on the substantial subject of the holding.<sup>4</sup> The

<sup>1</sup> 6 M. & Gr. 622, 623. See also the luminous judgment of Parke, B., *id.* 623—626.

<sup>2</sup> That is, from one quarter day to the next but one following. The exact number of months or days does not signify. Notice on 26th March to quit on 29th September, insufficient. Notice on 28th September to quit on 25th March, sufficient. *Morgan v. Davies*, L. R., 3 C. P. D. 260.

<sup>3</sup> *Doe v. Spence*, 6 East, 123, per *Ld. Ellenborough*. It is still a moot point in the Superior Courts, whether, in the absence of evidence of a contract or usage, a week's notice to quit is necessary to determine a weekly tenancy. See, and compare, *Jones v. Mills*, 10 Com. B., N. S. 788; 31 L. J., C. P. 66, S. C.; *Huffell v. Armitstead*, 7 C. & P. 56, per Parke, B.; and *Towne v. Campbell*, 3 Com. B. 921. In the County Courts, however, this question has been settled in the affirmative for the last thirty years. It seems, too, that if the hiring be monthly, a month's notice will be necessary; and if the hiring be quarterly, a quarter's notice will be necessary; *Towne v. Campbell*, 3 Com. B. 921, per *Coltman, J.* See also *Kemp v. Derrett*, 3 Camp. 510, per *Ld. Ellenborough*; *Right d. Flower v. Darby*, 1 T. R. 162, per *Ld. Mansfield*; *Bridges v. Potts*, 33 L. J., C. P. 338; 17 Com. B., N. S. 314, S. C.

<sup>4</sup> *Doe v. Snowdon*, 2 W. Bl. 1224; *Doe v. Spence*, 6 East, 120; *Doe v. Watkins*, 7 East, 551; *Doe v. Rhodes*, 11 M. & W. 600. In this last case the (2914)

Agricultural Holdings (England) Act, 1883, has, however, interfered with this time honoured rule; and provided the holding be either agricultural or pastoral, or both, or be wholly or in part cultivated as a market garden,<sup>1</sup> a year's notice, "expiring with a year of tenancy," has now become necessary in every contract, whether made before or after the commencement of that Act, unless the landlord and tenant shall have agreed *in writing* that this enactment shall not apply, in which case a six months' notice shall continue to be sufficient.<sup>2</sup> In the case of domestic servants,—which term has been held to include huntsmen,<sup>3</sup> and head-gardener,<sup>4</sup>—a reasonable notice to quit is a calendar month's warning;<sup>5</sup> but it must be borne in mind that this rule is inapplicable to farm servants,<sup>6</sup> clerks, travellers, governesses,<sup>7</sup> housekeepers in large hotels,<sup>8</sup> and the like. So, the reasonable period during which a member of Parliament is entitled to freedom from arrest on a *ca. sa.* has, for at least two hundred years, been fixed at forty days before and after each session, the rule being the same in the case of a dissolution as in that of a prorogation.<sup>9</sup> In all these cases, the question being decided by a precise rule of law, is entirely withdrawn from the consideration of the jury.

§ 35. Again, the reasonable time for which a party charged with an indictable offence may, in England or Ireland, be committed for re-examination is now,—with one exception recognised in England,<sup>10</sup>—

questions raised, but not decided, was whether, where a tenant held a farm from year to year,—the land from 2 Feb., the house from 1 May,—a notice to quit the whole, given half a year before 2 Feb., was sufficient to entitle the landlord to recover the whole in ejectment, on a demise dated 3 Feb. The inclination of Ld. Abinger's opinion appears to have been in support of the affirmative.

<sup>1</sup> 46 & 47 V., c. 61, § 54. See also 39 & 40 V., c. 63, Ir., as to the corresponding law of Ireland.

<sup>2</sup> 46 & 47 V., c. 61, § 33.

<sup>3</sup> Nicoll v. Greaves, 33 L. J., C. P. 259; 17 Com. B., N. S. 27, S. C.

<sup>4</sup> Nowlan v. Ablett, 2 C. M. & R. 54.

<sup>5</sup> Nowlan v. Ablett, 2 C. M. & R. 54; Fawcett v. Cash, 5 B. & Ad. 904; 3 N. & M. 177, S. C.

<sup>6</sup> Lilley v. Elwin, 11 Q. B. 742.

<sup>7</sup> Todd v. Kerrick, 8 Ex. R. 151. See post, § 177.

<sup>8</sup> Lawler v. Linden, 1 R., 10 C. L. 188.

<sup>9</sup> Goudy v. Duncombe, 1 Ex. R. 430; In re Anglo-French Co-operat. Soc., L. R., 14 Ch. D. 533.

<sup>10</sup> This exception prevails when a court of summary jurisdiction is empowered to deal summarily with an indictable offence, in which case the

limited by statute to eight clear days, where the accused is remanded by warrant, or, in England, to three clear days, where he is remanded by verbal order;<sup>1</sup> and although these rules have not been extended by express enactment to cases in which justices deal summarily with defendants by conviction or order, they would probably be considered by the judges as furnishing a guide, which ought on such occasions to be respected. If, therefore, in any of these cases, the question should arise whether a party had been remanded for a reasonable time, the jury would be called upon, as in the case of probable cause, to ascertain the existence of the facts, and to leave the court to determine, upon those facts, whether the time was reasonable or not.<sup>2</sup> On two occasions, indeed, in England,<sup>3</sup> and on one in Ireland,<sup>4</sup> the entire question appears to have been submitted to the jury, but the latter of the two English cases rested upon the authority of the former,<sup>5</sup> and in the former no objection was taken at *Nisi Prius* to the summing up of the judge,

person charged may be remanded "to the next practicable sitting of a petty sessional court," though such remand may be for more than eight days. 42 & 43 V., c. 49, § 24, subs. 2.

<sup>1</sup> 11 & 12 V., c. 42, § 21, enacts, that "if, from the absence of witnesses, or from any other reasonable cause, it shall become necessary or advisable to defer the examination, or further examination, of the witnesses for any time, it shall be lawful to and for the justice or justices, before whom the accused shall appear or be brought, by his or their warrant, from time to time to remand the party accused for such time as by such justice or justices, in their discretion, shall be deemed reasonable, not exceeding eight clear days, to the common gaol or house of correction, or other prison, lock-up-house, or place of security, in the county, riding, division, liberty, city, borough, or place, for which such justice or justices shall then be acting: or if the remand be for a time not exceeding three clear days, it shall be lawful for such justice or justices verbally to order the constable, or other person in whose custody such party accused may then be, or any other constable or person to be named by the said justice or justices in that behalf, to continue or keep such party accused in his custody, and to bring him before the same, or such other justice or justices as shall be there acting, at the time appointed for continuing such examination." See, as to the Irish law, 14 & 15 V., c. 93, § 14, Ir.

<sup>2</sup> *Davis v. Capper*, 10 B. & C. 28; 5 M. & R. 53; 4 C. & P. 134, S. C.

<sup>3</sup> *Davis v. Capper*, 10 B. & C. 30, per Gaselee, J.; *Cave v. Mountain*, 1 M. & Gr. 260, per Ld. Abinger; 1 Scott, N. R. 132, S. C.

<sup>4</sup> *Gillman v. Connor*, 2 Jebb & Sy. 210.

<sup>5</sup> *Cave v. Mountain*, 1 M. & Gr. 263, per Tindal, C. J., who adds that Ld. Abinger, who tried the cause, was, "under all the circumstances, satisfied with the verdict," and, consequently, the propriety of his leaving the question to the jury could not practically be questioned in the court above.

but on a subsequent motion in Banc its correctness was questioned, and at the second trial the course stated above was distinctly adopted.<sup>1</sup> So, under the old law, which used to render a sheriff liable to an action for an escape,<sup>2</sup> the question whether the officer was guilty of unreasonable delay in taking the party arrested to prison, was one for the determination of the judge,<sup>3</sup> and the same rule applies when the question is, whether an arrest has been countermanded within a reasonable time,<sup>4</sup> or whether an executor has had reasonable time to remove the goods from the testator's mansion.<sup>5</sup>

§ 36. On the other hand, it appears to have been held, that the § 30 questions, whether a crop has been left on the ground for a reasonable time,<sup>6</sup> so as to enable the tithe-owner to compare the tithe set out with the remainder of the produce; whether a copy of a rate has been delivered by an overseer to an inhabitant within such reasonable time as to satisfy the Act,<sup>7</sup> which requires it to be given "forthwith" upon demand and tender of payment;<sup>8</sup> whether the vendor of railway shares has offered to transfer them within a reasonable time;<sup>9</sup> whether the owner of cattle, which have strayed on land through defect of the proprietor's fences, has removed them within a reasonable time;<sup>10</sup> whether goods purchased by sample have been rejected,<sup>11</sup> or goods taken by distress have been sold,<sup>12</sup> within a reasonable time; whether a foreign or inland bill of exchange payable at or after sight has been presented,<sup>13</sup>—whether

<sup>1</sup> *Davis v. Capper*, 4 C. & P. 134 *a*, 138; 10 B. & C. 33, 35, 36, S. C.

<sup>2</sup> Such an action is no longer maintainable, either in England or in Ireland; 40 & 41 V., c. 21, § 31; 40 & 41 V., c. 49, § 43, Ir.

<sup>3</sup> *Benton v. Sutton*, 1 B. & P. 28, per Heath, J.

<sup>4</sup> *Scheibel v. Fairbairn*, 1 B. & P. 388. Heath, J., there held, that the arrest ought to have been countermanded in the course of the day in which the debt was received.

<sup>5</sup> Co. Lit. § 69, and p. 56 *b*.

<sup>6</sup> *Facey v. Hurdom*, 3 B. & C. 213.

<sup>7</sup> 17 G. 2, c. 3, § 2.

<sup>8</sup> *Tennant v. Bell*, 9 Q. B. 684.

<sup>9</sup> *Stewart v. Cauty*, 8 M. & W. 160.

<sup>10</sup> *Goodwyn v. Chevely*, 4 H. & N. 631.

<sup>11</sup> *Parker v. Palmer*, 4 B. & A. 387.

<sup>12</sup> *Pitt v. Shew*, 4 B. & A. 206.

<sup>13</sup> *Muilman v. D'Equino*, 2 H. Bl. 564; *Fry v. Hill*, 7 Taunt. 397. See ante, § 30, *ad. fin.* In determining this question, the jury should be directed (2917).

a blank stamped acceptance has been filled up by the holder,<sup>1</sup>—whether a voyage insured has been commenced or prosecuted,<sup>2</sup>—or whether costs have been taxed, within such time,<sup>3</sup> are to be decided by the jury. In attempting to reconcile these conflicting decisions, it may perhaps be urged, that the last-named questions turn upon the ordinary course of business or trade, and consequently relate to matters with which the jury are peculiarly acquainted; but whether this be a satisfactory solution of the difficulty is a matter on which no opinion is here expressed.

§ 37. Questions of *reasonable skill or care, due diligence, and gross negligence* must, in the great majority of instances, be determined by the jury,<sup>4</sup> since the judges can rarely have materials which will to take into consideration the interests, not only of the drawer, but of the holder also. *Ramchurn Mullick v. Luckmeechund Radakissen*, 9 Moo. P. C. R. 46; *Mellish v. Rawdon*, 9 Bing. 416. See *Chart. Merc. Bk. of India, &c. v. Dickson*, 3 Law Rep. P. C. 574; and *Van Diemen's Land Bk. v. Victoria Bk.*, 40 L. J., P. C. 28.

<sup>1</sup> *Temple v. Pullen*, 8 Ex. R. 389. The question of reasonable time does not arise in the case of a bank acceptance, when the bill is in the hands of a *bonâ fide* indorsee for value without notice. *Montague v. Perkins*, 22 L. J., C. P. 187.

<sup>2</sup> *Mount v. Larkins*, 8 Bing. 108; 1 M. & Sc. 165, S. C.; *Phillips v. Irving*, 7 M. & Gr. 325. In this last case, the question was left by consent for the decision of the court, who held, "that no certain or fixed time could be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port: but that the time allowed must vary with the varying circumstances, which may render it more or less difficult to obtain such cargo." *Id.* 328, 329 per *Tindal*, C. J.

<sup>3</sup> *Burton v. Griffiths*, 11 M. & W. 817. In this case there was an express traverse of reasonable time, and the judges above concurred with the finding of the jury.

<sup>4</sup> In the *Metropol. Ry. Co. v. Jackson*, L. R., 3 App. Cas. 193, 197; and 47 L. J., C. P. 303, 405, S. C., *Ld. Cairns, C.*, in *Dom. Proc.*, thus explained the principles applicable to these cases:—"The judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that the separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be



enable them to decide such questions by rules of law. Thus, if an action be brought against a surgeon for negligence in the treatment of his patient,<sup>1</sup> or against a gratuitous bailee for gross carelessness in losing the property intrusted to his care,<sup>2</sup> what law can possibly define whether such and such conduct amounts to sufficient negligence on the part of the defendant to entitle the plaintiff to a verdict? In these and the like cases, therefore, the question has usually been left entirely to the jury, and even when they have found a verdict in opposition to the opinion of the presiding judge, the court has generally refused to grant a new trial.<sup>3</sup> In some cases, where the question relates to matters of legal practice, as, for instance, if a sheriff be charged with neglect of duty in not executing a writ, or if a solicitor be sued for negligence in conducting an action, the judges would seem to be more competent than a jury to decide whether the facts proved amount to a want of reasonable care; but even in such cases it seems that the province of the judge is merely to inform the jury for what species or degree of negligence the defendant is answerable,<sup>4</sup> and what duty in the particular case devolved upon him, either by the statute or common law, or the practice of the court; and then, having done this, he will leave the

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inferred from any state of facts whatever." These sentences read smoothly, but the application of them will sometimes prove to be a *tough job*. See the case itself, which called forth the Lord Chancellor's remarks. See, also, *Bridges v. N. Lond. Ry. Co.*, 7 Law Rep., H. L. 213; 43 L. J., Q. B. 151, S. C.; *Robson v. N. East. Ry. Co.*, 46 L. J., Q. B. 50; L. R., 2 Q. B. D. 85, S. C. in Ct. of App.; *Rose v. N. East. Ry. Co.*, L. R., 2 Ex. D. 248, per Ct. of App.; 46 L. J., Ex. 374, S. S.

<sup>1</sup> 2 A. & E. 261, per Taunton, J.

<sup>2</sup> *Doorman v. Jenkins*, 2 A. & E. 256; 4 N. & M. 170, S. C.

<sup>3</sup> *Doorman v. Jenkins*, 2 A. & E. 260—266, per Cur., commenting on and explaining *Shiells v. Blackburne*, 1 H. Bl. 158; *Moore v. Mourgue*, 2 Cowp. 479.

<sup>4</sup> In *Godefroy v. Dalton*, 6 Bing. 460, the judges decided that an attorney had not been guilty of such negligence as would render him liable to an action. "The cases," said Tindal, C. J., in pronouncing the judgment of the court, "appear to establish in general, that the attorney is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause, as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in a higher branch of the profession of the law." P. 468.

jury to consider all the circumstances in evidence, and to decide, first, whether the defendant has performed his duty, and next, whether, in case of non-performance, the neglect was of that sort or degree which was venial or culpable in the sense of not sustaining or sustaining an action.<sup>1</sup> It may here be added, that the judges are the proper parties to decide whether fines, customs, or services are reasonable,<sup>2</sup> and also whether deeds contain reasonable covenants or powers.<sup>3</sup>

§ 38. The proper tribunal for deciding questions of *bona fides*,<sup>4</sup> *actual knowledge*,<sup>5</sup> *express malice*,<sup>6</sup> *real intention*,<sup>7</sup> or *reasonable cause*, is the jury; but it will presently be seen, in the chapter on Presumptive Evidence, and in other parts of this work, that the law will sometimes presume the existence of fraud, knowledge, malice, intention, or justification, from the proof of other remote facts; and whenever these presumptions are embodied in the rules of law, the court will either draw the inference without the aid of a jury, or the jury will be bound to follow the directions of the judge. Moreover, for particular purposes the decision of these questions is sometimes entrusted to the judge either by the practice of the court, or by the express language of the Legislature. Thus, in actions against magistrates for acts done in the execution of their office, the judge must decide whether notice of action is necessary, and the question of *bona fides* must consequently be determined by him, and not by the jury.<sup>8</sup> So when an amendment is sought to be made at Nisi

<sup>1</sup> *Hunter v. Caldwell*, 10 Q. B. 69, 82, per *Ld. Denman*; *Reece v. Rigby*, 4 B. & A. 202, per *Abbott, C. J.*; *Shilcock v. Passman*, 7 C. & P. 292, 293, per *Alderson, B.*

<sup>2</sup> *Co. Lit.* 56 *b*, 59 *b*; *Wilson v. Hoare*, 10 A. & E. 236; *Bell v. Wardell*, *Willes*, 202. <sup>3</sup> *Smith v. Doe d. Jersey*, 2 B. & P. 592, per *Abbott, C. J.*

<sup>4</sup> *Wedge v. Berkeley*, 6 A. & E. 663; 1 N. & P. 665, S. C.; *Moore v. Mourgue*, 2 Cowp. 480; *Gray v. Dinnen*, 2 *Jebb. & Sy.* 265; *Coxhead v. Richards*, 2 Com. B. 584, per *Cresswell, J.*; *Hazeldine v. Grove*, 3 Q. B. 1007; *Hughes v. Buckland*, 15 M. & W. 346; *Horn v. Thornborough*, 3 Ex. R. 846; 6 Dowl. & L. 651, S. C.; *Douglas v. Ewing*, 6 Ir. Law R., N. S. 395. See ante, § 29. <sup>5</sup> *Harratt v. Wise*, 9 B. & C. 712.

<sup>6</sup> As in actions for malicious prosecution or arrest. *Mitchell v. Jenkins*, 5 B. & Ad. 588; 1 Camp. 207, n. a.

<sup>7</sup> *Doe v. Wilson*, 11 East, 56; *Powis v. Smith*, 5 B. & A. 850; *Doe v. Batten*, 1 Cowp. 243; *Zouch v. Willingale*, 1 H. Bl. 312, per *Gould* and *Wilson, J.*; *Cox v. Reid*, 13 Q. B. 558.

<sup>8</sup> *Kirby v. Simpson*, 23 L. J., M. C. 165; *Arnold v. Hamel*, 9 Ex. R. 404. (2920)

Prius, it is the duty of the judge to determine, as a matter of fact, from the pleadings and the evidence, what is the real question in controversy between the parties.<sup>1</sup> Again, under the Act of 30 & 31 V., c. 142, § 5, as embodied in the Supreme Court of Judicature Act, 1873,<sup>2</sup> and amended by 45 & 46 Vict., c. 57, § 4, a suitor in the Supreme Court, who recovers less than 20*l.* in any action founded on contract, or 10*l.* in any action founded on tort,<sup>3</sup> is not entitled to *any* costs, unless the judge shall certify that there was "*sufficient reason*" for suing in such court, or unless the court or a judge at chambers shall by rule or order allow such costs. In actions, too, founded on contract, in which the plaintiff recovers, in the Supreme Court, a sum (exclusive of costs) not exceeding 50*l.*, he is entitled to no more costs than those recognised in County Courts, unless the court or a judge otherwise orders.<sup>4</sup>

§ 39. In most other proceedings in the Supreme Court, the costs are now in the court's discretion, the law being embodied in the following rule :—<sup>5</sup>

"Subject to the provisions of the Acts<sup>6</sup> and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the *discretion* of the court or judge : Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund, to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a *jury*, the *costs shall follow the event*, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for *good cause*, otherwise order."<sup>7</sup>

<sup>1</sup> *Wilkin v. Reed*, 15 Com. B. 192, 198, 205.    <sup>2</sup> 36 & 37 V., c. 66, § 67.

<sup>3</sup> An action of detainee is "an action founded on tort" within the meaning of this enactment; *Bryant v. Herbert*, L. R. 3 C. P. D. 389, per Ct. of App.; 47 L. J., C. P. 670, S. C.    <sup>4</sup> Rules of Sup. Ct. 1883, Ord. lxx., r. 12.

<sup>5</sup> Rules of Sup. Ct. 1883, Ord. lxx., r. 1.

<sup>6</sup> These are "the Sup. Ct. of Judic. Acts, 1873 to 1879, and 1881." and "the App. Jurisd. Act, 1876." See Ord. lxxi., r. 1.

<sup>7</sup> *Quære*, Does this Rule extend to the Liverpool Passage Court? See *King v. Hawksworth*, L. R., 4 Q. B. D. 371; and 36 & 37 V., c. 66, § 91.

§ 39A. In interpreting the above Rule it seems clear, that when a cause is tried with a jury, the presiding judge may deprive a successful litigant of costs, either on an application being made to him for that purpose, or of his own motion.<sup>1</sup> If an application be made to the judge, that step should be taken either during the trial, or within a reasonable time after its termination;<sup>2</sup> and if the application be addressed to the court, it must—to be successful—be made without undue delay, but the court will have jurisdiction to entertain it, whether a previous application to the judge, who tried the cause, has or has not been made.<sup>3</sup> In no case, however, will either the judge or the court deprive the successful litigant of his costs unless for good cause.<sup>4</sup> With respect to what constitutes “good cause,” it has been held, that although the judge, in exercising his discretion, must assume the truth of the facts found by the jury, he is not confined to the consideration of the party’s conduct in the course of the litigation, but he may consider such of his previous acts as have conduced to the action.<sup>5</sup> In the case which called forth the above ruling by the Court of Appeal, the jury had awarded the plaintiff 10*l.* as damages for a libel, and the judge, notwithstanding, had deprived him of his costs, on the ground that he had by his own incautious conduct,—to use the mildest phrase,—brought upon himself the defamatory attack.<sup>6</sup> On the other hand, the court has decided that, in an action of collision of ships, in which the defendant had succeeded solely on a plea of compulsory pilotage, he ought not to be deprived of costs in the Exchequer Division, simply because such a result would have followed in the old Court of Admiralty.<sup>7</sup>

The “*event*,” which, in the absence of a special order, costs are to “follow,” is not a happily chosen phrase, as the attempts to

<sup>1</sup> *Turner v. Heyland*, 48 L. J., C. P. 535; L. R., 4 C. P. D. 432, S. C.; *Collins v. Welch*, L. R., 5 C. P. D. 27; S. C. on App., 49 L. J., C. P. 260; *Marsden v. Lanc. & York Ry. Co.*, 50 L. J., Q. B. 318, per Ct. of App.

<sup>2</sup> See *Kynaston v. Mackinder*, 47 L. J., Q. B. 76, per Ct. of App.

<sup>3</sup> See *Myers v. Defries*, and *Siddons v. Lawrence*, 48 L. J., Q. B. 446, per Ct. of App.; L. R., 4 Ex. D. 176, S. C.; *Bowey v. Bell*, 48 L. J., Q. B. 161; L. R., 4 Q. B. D. 95, S. C.; *Gen. St. Nav. Co. v. Lond. & Ed. Ship. Co.*, L. R., 2 Ex. D. 467; 47 L. J., Ex. 77, S. C.

See “*Jones v. Carling*, L. R., 13 Q. B. D. 262, where held by Ct. of App., 1st, that the facts must show that it would be more just to disallow than to allow the costs, as for instance, oppression or misconduct on part of the successful litigant; 2nd, That this question was one respecting which an appeal would lie.

<sup>4</sup> See end of Rule.

<sup>5</sup> *Harnett v. Vise*, L. R., 5 Ex. D. 307, per Ct. of App.

<sup>6</sup> *Id.*

<sup>7</sup> *Gen. St. Nav. Co. v. Lond. & Ed. Ship. Co.*, L. R., 2 Ex. D. 467; 47 L. J., Ex. 77, S. C.

interpret it have given rise to much vexatious controversy.<sup>1</sup> No doubt it was intended to mean, and does mean, in a general way, the result of all the proceedings incidental to the litigation in question; and, consequently, the costs which follow it will include the costs of all stages of that litigation, as, for example, the costs of a first trial when a second has been ordered.<sup>2</sup> But the difficulty occurs in deciding what is to happen, when a plaintiff has united, as he now may, several independent causes of action, and has succeeded on some of the issues, and failed on the others. In such a case several events have practically been determined, but the rule speaks only of one. Is the plaintiff then entitled to the whole costs of the actions if he has gained a verdict on any one item of his claim, or is the term "event" to be read distributively, in which case the plaintiff will have only the general costs of the cause, and the defendant will get the costs of those on which he succeeds? After much discussion, the Court of Appeal has at last held, that the rule must be interpreted in accordance with the second alternative.<sup>3</sup>

§ 40. When a question arises as to whether a *communication* be § 33  
*privileged* or not, and the privilege be of a character which is not regarded as *absolute* on public grounds,<sup>4</sup> the respective duties of the judge and jury seem to be as follows: first, the jury must determine as a question of fact, whether the communication was made *bona fide*; and then, if the fact be found in the affirmative,—as it must be if the evidence be not sufficient to raise a probability that the communication was colourably made,<sup>5</sup>—the judge must decide, as

<sup>1</sup> See *Collins v. Welch*, 49 L. J., C. P. 261, per Bramwell, L. J.; and *Myers v. Defries*, 49 L. J., Ex. 266.

<sup>2</sup> *Field v. Gt. North. Ry. Co.*, 2 Ex. D. 261; 47 L. J., Q. B. 662, S. C.; *Harris v. Petherick*, 48 L. J., Q. B. 521, per Ct. of App.; L. R., 4 Q. B. D.; 611, S. C.; *Green v. Wright*, L. R., 2 C. P. D. 354; 46 L. J., C. P. 427, per Ct. of App., S. C.

<sup>3</sup> *Myers v. Defries*, 49 L. J., Ex. 266, per Lds. Js.; L. R., 5 Ex. D. 180, S. C.; *Ellis v. Desilva*, 50 L. J., Q. B. 328, per Ct. of App.; L. R., 6 Q. B. D. 521, S. C.; *Sparrow v. Hill*, 50 L. J., Q. B. 410; L. R., 7 Q. B. D. 362, S. C.

<sup>4</sup> As to such privileged communications, see *Dawkins v. Paulet*, 5 Law Rep., Q. B. 94; 9 B. & S. 768; 39 L. J., Q. B. 53, S. C.; and *Dawkins v. Ld. Rokeby*, 8 Law Rep., Q. B. 255, per Ex. Ch.; 42 L. J., Q. B. 63, S. C.

<sup>5</sup> *Taylor v. Hawkins*, 16 Q. B. 308; *Somerville v. Hawkins*, 10 Com. B. 563.

a question of law, whether the occasion of the publication was such as to rebut the inference of malice.<sup>1</sup> If, however, any doubt should exist as to whether or not the defendant had in some respect exceeded the limits of his privilege, and had made comments, which might be regarded as evidence of *actual* malice, the opinion of the jury must be taken upon the effect of such evidence.<sup>2</sup>

§ 41. It is still a moot point whether, on an indictment for perjury, the materiality of the matter in which the false swearing is proved, is a question of fact for the jury, or a question of law for the judge; but, according to the better opinion, it ought to be regarded in the latter light.<sup>3</sup> It seems, however, that questions respecting permissive occupation;<sup>4</sup> the assent of an executor to a bequest;<sup>5</sup> the unsoundness of a horse;<sup>6</sup> the delivery of a document as an escrow, unless the question turn solely on the construction of writings;<sup>7</sup> the infringement of a patent,<sup>8</sup> where such infringement does not depend merely on the construction of the specification;<sup>9</sup> the novelty of a design, within the meaning of the Acts relating to copyright of design for articles of manufacture;<sup>10</sup> the existence of a nuisance, as caused by erecting a bridge or weir in a navigable stream;<sup>11</sup> the definition of the word "street,"<sup>12</sup> except in certain

<sup>1</sup> *Coxhead v. Richards*, 2 Com. B. 584, 603, per Crosswell, J.; 600, per Coltman, J.; *Stace v. Griffith*, 6 Moo. P. C., N. S. 18.

<sup>2</sup> *Cooke v. Wildes*, 5 E. & B. 328.

<sup>3</sup> See and compare *R. v. Courtney*, 7 Cox, 111; 5 Ir. Law R., N. S. 434, S. C.; *R. v. Lavey*, 3 C. & Kir. 26; *R. v. Dunstan*, Ry. & M. 109.

<sup>4</sup> *Lessee of Phayre v. Fahy*, *Hayes & Jon.* 128; *Jones v. Boland*, 2 Jebb & Sy. 289; but see *Whiteacre v. Symonds*, 10 East, 13.

<sup>5</sup> *Mason v. Farnell*, 12 M. & W. 674, even though "the question depends upon the careful and somewhat critical comparison of the terms of a deed, with the other circumstances and facts of the case," per Alderson, B., *id.* 682, pronouncing the judgment of the court. See also *Elliott v. Elliott*, 9 M. & W. 27, per *Ld. Abinger*.

<sup>6</sup> See per Patteson, J., in *Baylis v. Lawrence*, 11 A. & E. 926.

<sup>7</sup> *Furness v. Meek*, 27 L. J., Ex. 34. See post, §§ 43, 1834.

<sup>8</sup> *De la Rue v. Dickenson*, 7 E. & B. 738; *Lister v. Leather*, 27 L. J., Q. B. 295; 8 E. & B. 1004, S. C.

<sup>9</sup> *Seed v. Higgins*, 8 H. of L. Cas. 550, 561, 565. See post, § 43.

<sup>10</sup> *Harrison v. Taylor*, 29 L. J., Ex. 3.

<sup>11</sup> *R. v. Betts*, 16 Q. B. 1022; *R. v. Russell*, 6 B. & C. 566; *R. v. Ward*, 4 A. & E. 384.

<sup>12</sup> *R. v. Fullford*, 1 L. & Cave, 403; 9 Cox, 453, S. C.

cases where the term has been employed in an Act of Parliament;<sup>1</sup> the seaworthiness of a ship;<sup>2</sup> the materiality of facts not communicated in effecting an insurance;<sup>3</sup> the competency of a testator in a will cause, and his freedom from undue influence;<sup>4</sup> the cruelty of a husband as a ground for judicial separation;<sup>5</sup> and the condonation of a conjugal offence,<sup>6</sup> are for the jury, though the judge ought to take care that they are not misled by anything that comes out in the evidence.<sup>7</sup> So, it is the undoubted privilege of the jury to determine whether there has been an acceptance of goods sufficient to satisfy the Statute of Frauds.<sup>8</sup> So, the question whether a tender be absolute or conditional is usually one for the jury;<sup>9</sup> the court, however, being mindful to point out that a tender is not invalid in law as being conditional, if it merely implies that the debtor admits no more to be due, but that it must go further, and imply that the creditor, if he consents to take the sum offered, will be required to admit that his entire claim is satisfied.<sup>10</sup> The jury, also, in any question relating to the amount of interest payable on a foreign bill of exchange, will determine as facts, first, what rate of interest is usually paid at the respective places where the bill was drawn or indorsed or accepted, and next, whether the plaintiff has sustained any damage requiring the payment of interest at all; but the judge will decide as a pure question of law, whether the case is to be governed *lege loci contractus*, or *lege loci solutionis*.<sup>11</sup>

§ 42. The jury must decide whether articles supplied to an infant be *necessaries*: but their decision is subject to the control of the

<sup>1</sup> *Robinson v. Local Board of Barton*, 52 L. J., Ch. 5; L. R. 21 Ch. D. 621, S. C. See *Maude v. Baildon Local Board*, L. R., 10 Q. B. D. 394.

<sup>2</sup> *Clifford v. Hunter*, 3 C. & P. 16, per Ld. Tenterden; M. & M. 103, S. C.

<sup>3</sup> *Rawlings v. Desborough*, 2 M. & Rob. 328, per Ld. Denman.

<sup>4</sup> *Purdon v. Ld. Longford*, I. R., 11 C. L. 267.

<sup>5</sup> *Tomkins v. Tomkins*, 1 Swab. & Trist. 168.

<sup>6</sup> *Peacock v. Peacock*, 1 Swab. & Trist. 183.

<sup>7</sup> Per Ld. Abinger in *Mackintosh v. Marshall*, 11 M. & W. 126.

<sup>8</sup> *Lillywhite v. Devereux*, 15 M. & W. 291, per Alderson, B., recognising *Edan v. Dudfield*, 1 Q. B. 302, 307; 4 P. & D. 656, S. C.; *Clark v. Wright*, 11 Ir. Law R., N. S. 402.

<sup>9</sup> *Eckstein v. Reynolds*, 7 A. & E. 80; *Marsden v. Goode*, 2 C. & Kir. 133.

<sup>10</sup> *Bowen v. Owen*, 11 Q. B. 130; *Bull v. Parker*, 2 Dowl., N. S. 345; *Henwood v. Oliver*, 1 Q. B. 409.

<sup>11</sup> *Gibbs v. Fremont*, 9 Ex. R. 25.

judges,<sup>1</sup> who have laid down, as general rules of law, first, that this question does not, in any degree, depend upon what allowance the infant may have received from his father, and may have misapplied;<sup>2</sup> secondly, that the articles must be *really useful*, and therefore that merely ornamental jewelry,<sup>3</sup> or luxurious confectionary,<sup>4</sup> are not necessities; and thirdly, that, if useful, they must be such as would be necessary and suitable to the degree and station in life of the infant.<sup>5</sup> In a case, where the jury, in opposition to the opinion of the judge, found that the hiring of horses and gigs was necessary for an Oxford undergraduate, he being the younger son of a man of fortune, and keeping a horse of his own, the court set aside the verdict as perverse, and granted a new trial;<sup>6</sup> and the same course was pursued, where an Irish jury had found that a hunter was "necessary" for a mere boy, who, having bragged at a ball that he was a member of the Surrey Stag Hunt, and worth 600*l.* a year, had induced an Irishman to sell him his horse for 150*l.*, had hunted the animal through the season, and had then, when payment was demanded, set up, through his guardian, what was described by an indignant advocate as "the shabby defence of infancy."<sup>7</sup> Perhaps the safest rule that can be laid down on this subject is, that the judge must determine whether the articles are *capable* of being necessities, regard being had to the position of the defendant; and if he should decide in the affirmative, the jury will then have to say, whether under the circumstances they were necessities or not.<sup>8</sup>

<sup>1</sup> *Harrison v. Fane*, 1 M. & Gr. 553, per Tindal, C. J.; *Ryder v. Wombwell*, 38 L. J., Ex. 8, per Ex. Ch.; 4 Law Rep., Ex. 32, S. C.

<sup>2</sup> *Burghart v. Hall*, 4 M. & W. 727; *Peters v. Fleming*, 6 M. & W. 46; but see *Barnes v. Toye*, L. R., 13 Q. B. D. 410, where held that, on a question of necessities, infant might prove that at date of sale he was sufficiently supplied with other similar goods.

<sup>3</sup> *Peters v. Fleming*, 6 M. & W. 47, 48, per Parke & Alderson, B.; *Ryder v. Wombwell*, 38 L. J., Ex. 8, per Ex. Ch.; 4 Law Rep., Ex. 32, S. C. In the latter case, a pair of jeweled solitaires and a silver-gilt goblet were held not to be "necessaries"; but in the former case it was determined that the jury were entitled to say, whether a watch and gold chain were necessities for an undergraduate. They found, as is their wont, in the affirmative.

<sup>4</sup> *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie*, and *Cripps v. Hills*, 1 D. & M. 544; 5 Q. B. 606, S. C.

<sup>5</sup> *Peters v. Fleming*, 6 M. & W. 42.

<sup>6</sup> *Harrison v. Fane*, 1 M. & Gr. 550.

<sup>7</sup> *Skrine v. Gordon*, I. R. 9 C. L. 479.

<sup>8</sup> *Wharton v. Mackenzie*, and *Cripps v. Hill*, 5 Q. B. 606; 1 D. & M. 544, S. C.; in which cases juries having decided that wine parties and suppers



§ 43. *The construction of all written documents*,—which term it is presumed necessarily includes Acts of Parliament, judicial records, deeds, wills, negotiable instruments, agreements, or letters,—belongs to the court alone, whose duty it is to construe all such instruments, as soon as the true *meaning of the words*<sup>1</sup> in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury;<sup>2</sup> and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained;<sup>3</sup> or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the court is the proper subject of redress in a court of error; but a misconstruction by the jury cannot in any way be effectually set right.<sup>4</sup> Thus the court, after obtaining from the jury a mere explanation of technical terms,<sup>5</sup> will construe the specification of a patent, though the interpretation of such an instrument,—relating as it does to matters of science and skill,—would seem peculiarly adapted to the practical information of jurors;<sup>6</sup> and where a contract

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were necessities for Oxford undergraduates, the Court of Q. B. granted new trials. In *Chapple v. Cooper*, 13 M. & W. 252, the court held that the funeral of a husband, who had left no property to be administered, might be regarded as “necessaries” supplied to his infant widow. Legal expenses in preparing a marriage settlement have also been held “necessaries” for an infant bride. *Helpe v. Clayton*, 17 Com. B., N. S. 553.

<sup>1</sup> See *Ashforth v. Redford*, 9 Law Rep., C. P. 20; 43 L. J., C. P. 57, S. C.; *Alexander v. Vanderzee*, 7 Law Rep., C. P. 530. But see *Bowes v. Shand*, in Dom. Proc. 8 June, 1877, affirming *Shand v. Bowes*, L. R., 1 Q. B. D. 470; 45 L. J., Q. B. 507, S. C.

<sup>2</sup> See *Tamvaco v. Lucas*, 1 B. & S. 185; S. C. in Ex. Ch., 3 B. & S. 89; *Lyle v. Richards*, 35 L. J., Q. B. 214, in Dom. Proc.; 1 Law Rep., H. L. 222, S. C.; *D. of Devonshire v. Neill*, 2 L. R. Ir. 134, 182, per Palles, C. B.

<sup>3</sup> *Key v. Cotesworth*, 7 Ex. R. 595. In *Lang v. Smith*, 7 Bing. 284, the court held that the jury were rightly directed to determine, as a question of mercantile usage, whether certain Neapolitan bonds passed by the mere delivery of the coupons, without the production of the certificates.

<sup>4</sup> *Per Parke, B.*, pronouncing the judgment of the court in *Neilson v. Harford*, 8 M. & W. 823.

<sup>5</sup> *Hills v. Evans*, 31 L. J., Ch. 457.

<sup>6</sup> *Neilson v. Harford*, 8 M. & W. 806, 818, 819; 2 Webst. Pat. R. 295, 328, S. C.; *Bovill v. Pimm*, 11 Ex. R. 718. These cases virtually overrule *Hill v. Thompson*, 3 Mer. 630, where *Ld. Eldon* observed, that the *intelligibility of the description* of a specification was a matter of fact. It is worthy of remark, that in America the sufficiency of the description in a patentee's

for the sale of barley was attempted to be proved by letters, one of which offered *good* barley, and the other accepted the offer, "expecting you will give us *fine* barley, and good weight," the court held, that though the jury might be asked as to the mercantile meaning of the words "good" and "fine," yet, after having found that there was a distinction between them, they could not further decide that the parties did not misunderstand each other, but were bound to take the interpretation of the contract, as a matter of law, from the judge.<sup>1</sup> So, the question whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty, or as liquidated damages,<sup>2</sup> is one of law to be decided by the judge, upon a consideration of the whole instrument;<sup>3</sup> and the question whether a letter amounts to a guarantee must be determined by the court alone, provided it contains no words of doubtful trade meaning, and the intrinsic facts are not in controversy.<sup>4</sup> So it seems clear,—notwithstanding one or two authorities to the contrary,<sup>5</sup>—that the court

specification is generally left as a question of fact to be determined by the jury, unless the statement be obviously too vague. *Wood v. Underhill*, 5 How. S. Ct. R. 1, 4. See *Bush v. Fox*, 5 H. of L. Cas. 707; *Booth v. Kennard*, 2 H. & N. 84; *Hills v. London Gaslight Co.*, 5 H. & N. 312; 29 L. J., Ex. 409, S. C.; and *Betts v. Menzies*, 1 E. & E. 990, 1020; in which cases it was held that, where in a patent cause the want of novelty appears distinctly from documents, such for instance as a prior patent and specification, the judge, and not the jury, must notice the identity of the two supposed inventions, and the consequent want of novelty in the second. See, too, *Betts v. Menzies*, as ultimately decided in the House of Lords, 10 H. of L. Cas. 117; and *Seed v. Higgins*, 8 H. of L. Cas. 550, 561, 565. But see also the observations of Ld. Westbury, Ch., on *Bush v. Fox*, and the law supposed to be there laid down, in *Hills v. Evans*, 31 L. J., Ch. 461, 462.

<sup>1</sup> *Hutchison v. Bowker*, 5 M. & W. 535. Parke, B., there observed, "The law I take to be this,—that it is the duty of the court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of those expressions was, but for the court to decide what the meaning of the contract was." P. 542. See also *Bourne v. Gatcliffe*, 3 M. & Gr. 643, 680, 690; 3 Scott, N. R. 1, S. C.; *Griffiths v. Rigby*, 1 H. & N. 237; *Hills v. London Gaslight Co.*, 27 L. J., Ex. 60; *Kirkland v. Nisbet*, 3 Macq. Sc. Cas., H. of L. 766; *Montgomery v. Middleton*, 13 Ir. Law R., N. S. 173.

<sup>2</sup> See *Wallis v. Smith*, L. R. 21 Ch. D. 243; 52 L. J., Ch. 145, S. C.

<sup>3</sup> *Sainter v. Ferguson*, 7 Com. B. 727, per Wilde, C. J. This question was in former times occasionally left to the jury. See *Crisdee v. Bolton*, 3 C. & P. 240, per Best, C. J.

<sup>4</sup> *Bk. of Montreal v. Munster Bk.*, I. R. 11 C. L. 47.

<sup>5</sup> *Lloyd v. Maund*, 2 T. R. 760; *Linsell v. Benson*, 2 Bing. N. C. 241.

must determine, whether a written acknowledgement or a debt,<sup>1</sup> or of title,<sup>2</sup> is sufficient to take the case out of the statutes of limitation; though, perhaps, in a doubtful case, it may be a prudent course for the judge to express his own opinion, and also to take the opinion of the jury;<sup>3</sup> and if the document is connected with other evidence affecting its construction, then the whole must be submitted to the jury together.<sup>4</sup>

§ 44. With respect to the construction of *letters*, the rule of law appears to be, that, if extrinsic circumstances be not capable of explaining them, then, like other documents, their interpretation is a pure matter of law, in however ambiguous language they may be couched;<sup>5</sup> but if they be written in so dubious a manner as to bear different constructions, and if they can be explained by other transactions, the jury, who are clearly the judges of the truth or falsehood of such collateral facts, which may vary the sense of the letters themselves, must decide upon the whole evidence.<sup>6</sup> Thus, where a question arose in Ireland whether the defendant had adopted the acceptance of a bill, it was held that the construction of a letter written by him on the subject, taken in connection with his subsequent conduct, was entirely for the jury.<sup>7</sup> So, where a contract has to be made out partly by letters, and partly by parol evidence, the jury must deal with the whole question.<sup>8</sup> If a document be lost, and oral evidence be given of its contents, the judge must construe its meaning in the same manner as if it had been produced, but the

<sup>1</sup> *Morrell v. Frith*, 3 M. & W. 402; *Routledge v. Ramsay*, 8 A. & E. 222, per Ld. Denman.

<sup>2</sup> *Doe v. Edmonds*, 6 M. & W. 302, per Parke, B.

<sup>3</sup> *Bucket v. Church*, 9 C. & P. 211, per Parke, B.; *Morrell v. Frith*, 3 M. & W. 406, per id.

<sup>4</sup> *Routledge v. Ramsay*, 8 A. & E. 222, per Ld. Denman; *Morrell v. Frith*, 3 M. & W. 402; *Moore v. Garwood*, 4 Ex. R. 681; *Ashpittel v. Sercombe*, 5 Ex. R. 163, 164; *Foster v. Mentor Life Ass. Co.*, 3 E. & B. 48.

<sup>5</sup> *Furness v. Meek*, 27 L. J., Ex. 34.

<sup>6</sup> Per Buller, J. *Mackbeath v. Haldimand*, 1 T. R. 182; *Smith v. Thompson*, 8 Com. B. 44. See *Lyle v. Richards*, 35 L. J., Q. B. 214, in Dom. Proc.; 1 Law Rep., H. L. 222, S. C.

<sup>7</sup> *Wilkinson v. Storey*, 1 Jebb & Sy. 509. See *Brook v. Hook*, 6 Law Rep., Ex. 89; 40 L. J., Ex. 50, S. C.

<sup>8</sup> *Bolckow v. Seymour*, 17 Com. B., N. S. 107.

jury may, of course, in such a case be called upon to declare whether they believe the oral testimony.<sup>1</sup>

§ 45. The power of the jury to interpret expressions is not confined to such as are employed in contracts, or have a peculiar commercial meaning; but seems to extend to all phrases, capable of being used in a technical sense, which do not require any knowledge of the law to explain them. Thus, the courts have more than once refused to entertain the question, whether an excavation is a mine,<sup>2</sup> and as such not rateable to the relief of the poor; but having so far laid down a legal principle with reference to the subject, as to decide that the method of working was to be considered, and not the chemical or geological character of the produce,<sup>3</sup> they have declined to go further, and have left the magistrates in Sessions to apply to the question, as one of fact, the information they possess, and their knowledge of the English language.<sup>4</sup> So, it has been held, that the jury must determine what constitutes such a representation of part of a dramatic production, as to subject the person representing it to penalties under the Act of 3 & 4 W. 4, c. 15.<sup>5</sup> But if a word of doubtful import be used in an Act of Parliament, the judge ought to explain its general meaning; and, therefore, when, on the trial of an issue whether a railway was passing through "a town," within the meaning of the Railway Clauses Consolidation Act, the

<sup>1</sup> *Berwick v. Horsfall*, 27 L. J., C. P. 193; 4 Com. B., N. S. 450, S. C.

<sup>2</sup> If any question arises as to whether a mine is a mine within the meaning of the Mines Regulation Acts, 1872, it "shall be referred to a Secretary of State, whose decision thereon shall be final." 35 & 36 V., c. 76, § 70; and c. 77, § 39.

<sup>3</sup> See *Darvill v. Roper*, 3 Drew. 303; *Bell v. Wilson*, 2 Drew. & Sm. 395; 35 L. J., Ch. 337, per Lds. Js., S. C.; 1 Law Rep., Ch. Ap. 303, S. C.; *Dow. Duch. of Cleveland v. Meyrick*, 37 L. J., Ch. 125, per Malins, V.-C. But see *Jones v. Cwmorthen Slate Co.*, L. R., 4 Ex. D. 97; 48 L. J., Ex. 486, S. C.; affirmed on App. 49 L. J., Ex. 110; and L. R., 5 Ex. D. 93, S. C. See also *Midl. Ry. Co. v. Haunchwood Brick and Tile Co.*, L. R., 20 Ch. D. 552; 51 L. J., Ch. 778, S. C.

<sup>4</sup> *R. v. Sedgeley*, 2 B. & Ad. 65; *R. v. Brettell*, 3 B. & Ad. 424; *R. v. Dunsford*, 2 A. & E. 568; 4 N. & M. 349, S. C. "The Court of Quarter Sessions are judges of law and fact. The appeal to the Queen's Bench is confined to questions of law. The distinction, therefore, between the respective provinces of the two courts is so far analogous to the distinction under discussion, as to justify the drawing of illustrations from cases of appeal." 12 Law Mag. 64, n. 2.

<sup>5</sup> *Planché v. Braham*, 4 Bing. N. C. 19.

judge merely told the jury that the word "town" was to be understood in its ordinary and popular sense, the court held that this was a misdirection, and granted a new trial in consequence.<sup>1</sup> So, the jury will not be allowed to examine a record, for the purpose of giving their opinion as to what word has been written above an erasure; for the inspection of a record is within the peculiar province of the court.<sup>2</sup>

§ 46. On the rule of law, which intrusts the judge with the interpretation of written instruments, an exception has been engrafted in certain cases, when the writing forms the subject of an indictment or an action, and the guilt or innocence of the defendant depends upon the popular meaning of the language employed. Thus, on a prosecution for *libel*, the legislature,—after much acrimonious discussion between the judges on the one hand, and the advocates of popular rights on the other,<sup>3</sup>—has expressly determined,<sup>4</sup> that the question whether the particular publication,

<sup>1</sup> *Elliott v. South Devon Rail. Co.*, 2 Ex. R. 725

<sup>2</sup> *R. v. Hucks*, 1 Stark. R. 522, per *Ld. Ellenborough*.

<sup>3</sup> As to this celebrated dispute, see, in support of the claims of the judges, *R. v. Udall*, 1 How. St. Tr. 1289; *R. v. Woodfall*, 20 id. 913, 918, 920, per *Ld. Mansfield*; 5 Burr. 2661, S. C.; *R. v. Dean of St. Asaph*, 21 How. St. Tr. 1033, per *Ld. Mansfield*: and in support of the rights of the jury, *R. v. Tutchin*, 14 id. 1128, per *Ld. Holt*; *R. v. Owen*, 18 id. 1223, 1227; *R. v. Dean of St. Asaph*, 21 id. 922, 971, arguments of Mr. Erskine, and 1040, per *Willes, J.*; 29 id. 49, per *Ld. Ellenborough*; 1 Woodfall's Junius, 14, et seq., 163, 169—176. As to the proceedings in the House of Lords on the passing of the Libel Act, see 22 How. St. Tr. 294, 297.

<sup>4</sup> 32 G. 3, c. 60, § 1, declares and enacts that, on every trial of an indictment or information for a libel, "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge, before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." § 2 provides, that, "on every such trial, the court or judge, before whom such indictment or information shall be tried, shall,\* according to their or his discretion, give their or his opinion and directions to the jury on the

\* *Semble*, the word "shall" should here be interpreted as if the word "may" had been used. See per *Littledale, J.*, in *Baylis v. Lawrence*, 11 A. & E. 925.

which is the subject of inquiry, is of a libellous character, and is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is one upon which the jury must exercise their judgment and pronounce their opinion, as a question of fact. The judge, indeed, as a matter of advice to them in deciding that question, may give his own opinion respecting the nature of the publication, but is not bound to do so as a matter of law.<sup>1</sup> The statute here noticed is strictly applicable to criminal trials only, but, being a declaratory Act, its provisions have been adopted in civil actions for libel, and, for a series of years, it has been the course for the judge,—in the event of his deciding that the words complained of are reasonably *capable* of bearing the defamatory meaning ascribed to them by the plaintiff,<sup>2</sup>—first to give a legal definition of the offence, and then to leave the jury to determine whether the writing complained of falls within that definition or not.<sup>3</sup> It is not, however, absolutely necessary that the judge should explain what constitutes a libel, but he may leave the whole question without reserve to the jury;<sup>4</sup> though if they find a verdict against the defendant, either on an indictment or an action, the court will arrest the judgment, if the writing on the face of it is not libellous.<sup>5</sup>

§ 47. On indictments for writing threatening letters,<sup>6</sup> the respective duties of the judge and jury are not very clearly defined. In some cases the jury have been permitted, upon examination of the paper, to decide for themselves whether or not it contained a menace.<sup>7</sup> In other cases, the question appears to have been exclusively determined by the court;<sup>8</sup> while on a few occasions the

matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.” § 3 provides, that a jury may find a special verdict; and § 4 reserves to defendants a right to move in arrest of judgment.

<sup>1</sup> Per Parke, B., in *Parmiter v. Coupland*, 6 M. & W. 108.

<sup>2</sup> *Hunt v. Goodlake*, 43 L. J., C. P. 54; *Sturt v. Blagg*, 10 Q. B. 906, 908, per Wilde, C. J.

<sup>3</sup> *Parmiter v. Coupland*, 6 M. & W. 107, 108.

<sup>4</sup> *Baylis v. Lawrence*, 11 A. & E. 920.

<sup>5</sup> *Hearne v. Stowell*, 12 A. & E. 719; 4 P. & D. 696, S. C.; *Coldstein v. Foss*, 6 B. & C. 154; *Parmiter v. Coupland*, 6 M. & W. 108, per Alderson, B.

<sup>6</sup> See 24 & 25 V., c. 96, §§ 44, 46.

<sup>7</sup> *R. v. Girdwood*, 1 Lea. 142; 2 East. P. C. 1120, S. C.

<sup>8</sup> *R. v. Smith*, 1 Den. 510, 512; 2 C. & Kir. 882, 884, S. C.; *R. v. Pickford*, 4 C. & P. 227.

opinions of the jury, and of the judges, have alternately been taken on the point.<sup>1</sup>

§ 48. In regard to *foreign laws*,<sup>2</sup> usages and customs, which we § 40 have already seen<sup>3</sup> cannot be judicially noticed, but must be proved as facts in each particular case,<sup>4</sup> the distinction between the functions of the judge and the jury does not yet appear to be very clearly defined. It would seem, however, that while the *existence and abstract meaning* of the law must, in general, be determined by the jury on the testimony of the skilled witnesses,<sup>5</sup> it will be the duty of the court to decide, first, as to the competent knowledge of the witnesses called;<sup>6</sup> next, as to the admissibility of the documents by which they seek to refresh their memory; and lastly,<sup>7</sup> as to the special applicability of the law, when proved, to the particular matter in controversy.<sup>8</sup> If, indeed, the admissibility or inadmissibility of certain evidence depends on the existence or interpretation of a foreign law, the proof should exclusively be addressed to the court, as in other cases where questions respecting the admissibility of evidence rests upon disputed facts.<sup>9</sup> Perhaps, also, as all matters of law are properly referable to the court, and as the object of the proof of foreign law is to enable the court to instruct the jury respecting its bearing on the case in hand, it will always be advisable for the judge to assist the jury in ascertaining what the law really is.<sup>10</sup>

<sup>1</sup> *R. v. Robinson*, 2 Lea. 755, 765; *R. v. Coady*, 15 Cox, 89, Ir.

<sup>2</sup> As to *colonial laws*, see ante, § 9.

<sup>3</sup> Ante, § 5.

<sup>4</sup> Although a point of foreign law may have been proved and acted upon in one court, another court will not rely upon the report of such a case, but will require fresh proof of the law, as a matter of fact, on each particular occasion; *M'Cormick v. Garnett*, 23 L. J., Ch., 717, per Knight-Bruce, L. J.; 5 De Gex M. & G. 278, S. C.

<sup>5</sup> *R. v. Picton*, 30 How. St. Tr. 536—540, 864—870.

<sup>6</sup> *Bristow v. Sequeville*, 5 Ex. R. 275. The whole of this subject will be discussed, post, §§ 1423—1425.

<sup>7</sup> See *Sussex Peer. Case*, 11 Cl. & Fin. 114—117; *Ld. Nelson v. Ld. Bridport*, 8 Beav. 527; *Church v. Hubbart*, 2 Cranch, 187, 236—238.

<sup>8</sup> *Story*, Confli. § 638.

<sup>9</sup> *Trasher v. Everhart*, 3 Gill & John. 234, 242; *Story*, Confli. § 638, n. 3; ante, § 23.

<sup>10</sup> *Story*, Confli. § 638, & n. 3; *Mostyn v. Fabrigas*, 1 Cowp. R. 174, per Ld. Mansfield.

§ 40. Before leaving the subject of foreign law, it will be § 41  
important to notice, that the peculiar rules of evidence adopted  
in one country,—whether established by the practice of its courts,  
or enacted by the legislature for the government of those courts,  
—cannot be permitted to regulate the proceedings of courts in  
another country, when transactions, which took place in the  
former country, become the subject of investigation in the latter.<sup>1</sup>  
The law of evidence is the *lex fori* which governs the courts.  
Whether a witness is competent or not,—whether a certain matter  
requires to be proved by writing or not,—whether certain evidence  
proves a certain fact or not,—these, and the like questions, must  
be determined, not *lege loci contractus*, but by the law of the  
country where the question arises, where the remedy is sought  
to be enforced, and where the court sits to enforce it.<sup>2</sup> The case  
of *Clark v. Mullick*, which was decided before the law was altered  
by the Evidence Amendment Act, of 1851,<sup>3</sup> affords a striking  
example of this rule. There, the assignees of a bankrupt under  
an English fiat having brought an action in Calcutta against a  
debtor of the bankrupt, and the pleas having put in issue the  
bankruptcy and the assignment, it was held that the affirmative  
of these issues could not be proved by producing copies of the  
proceedings in the Bankruptcy Court, purporting to bear the seal  
of that court, and to be signed by the Clerk of Enrolments; for  
although, by the statutes relating to bankruptcy, such evidence  
was sufficient in English courts of justice, it was not at that time  
admissible in India, as the Acts did not extend to that country.<sup>4</sup>  
Again, although by the Scotch law, all instruments prepared and  
witnessed according to the provisions of the Act of 1681, are  
probative writs, and may be given in evidence without any proof,  
yet still, if it were required to prove one of these Scotch instru-  
ments in an English court, its mere production would not suffice,  
but it would be necessary to call one or other of the attesting

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<sup>1</sup> *Clark v. Mullick*, 3 Moo. P. C. R. 279, per Ld. Brougham.

<sup>2</sup> *Bain v. Whitehaven & Furness Junc. Rail. Co.*, 3 H. of L. Cas. 19, per Ld. Brougham.

<sup>3</sup> 14 & 15 V., c. 99, §§ 11 & 19.

<sup>4</sup> *Clark v. Mullick*, 3 Moo. P. C. R. 252, 280.



witnesses.<sup>1</sup> The case of *Brown v. Thornton*<sup>2</sup> is another illustration of this rule. There, a charter-party had been entered into at Batavia; and, in accordance with the Dutch law which prevails in that colony, the contract had been written in the book of the notary, and a copy, signed and sealed by him and countersigned by the governor of Java, had been delivered to each of the parties. In the courts of Java, the contract is proved by producing the notary's book; but in all other Dutch courts the copies are received as due evidence of the original. Under these circumstances, the plaintiff in an English court tendered his copy of the charter-party, as evidence of the contract, but the court held that it was inadmissible, on the ground that English judges could not adopt a rule of evidence from foreign courts. Several other cases could be cited to the same effect;<sup>3</sup> and in all, the distinction is recognised between *the cause of action*, which must be judged of according to the law of the country where it originated, and the *mode of proceeding*, including of course the rules of evidence, which must be adopted as it happens to exist in the country where the action is brought.<sup>4</sup>

§ 49A. Though the *lex fori* usually governs the laws of evidence, a remarkable exception to this doctrine is recognised by all courts-martial; for it is distinctly enacted by the Army Act, 1881,<sup>5</sup> first, that "a court-martial under this Act shall not, as respects the conduct of its proceedings, or the reception or rejection of evidence, or as respects any other matter or thing whatsoever, be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law, or ordinance of any legislature whatsoever, other than

<sup>1</sup> *Yates v. Thompson*, 3 Cl. & Fin. 577, 580, et seq., per Ld. Brougham.

<sup>2</sup> 6 A. & E. 185.

<sup>3</sup> *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Huber v. Steiner*, 2 Bing. N. C. 202; *British Linen Co. v. Drummond*, 10 B. & C. 903; *Appleton v. Ld. Braybrook*, 2 Stark. R. 6; 6 M. & Sel. 34, S. C.; *Black v. Braybrook*, 2 Stark. R. 7; 6 M. & Sel. 39, S. C.; *Don. v. Lippman*, 5 Cl. & Fin. 1, 13—17; *Leroux v. Brown*, 12 Com. B. 801; *Finlay v. Finlay*, 31 L. J., Pr. & Mat. 149.

<sup>4</sup> *Mostyn v. Fabrigas*, 1 Smith, L. C. 641. See also *Story*, Conf. §§ 556, et seq. & 629—636.

<sup>5</sup> 44 & 45 V., c. 58, §§ 127 & 128.

the Parliament of the United Kingdom;" and next, that "the rules of evidence to be adopted in proceedings before courts-martial shall be the same as those which are followed in civil courts in England; and no person shall be required to answer any question or to produce any documents, which he could not be required to answer or produce in similar proceeding before a civil court."

## CHAPTER IV.

## THE GROUNDS OF BELIEF.

§ 50.<sup>1</sup> We proceed now to a brief consideration of the *General* § 42  
*Nature and Principles of Evidence*. No inquiry is here proposed into the origin of human knowledge; it being assumed, on the authority of approved writers, that all that men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge acquired by an individual through his own perception and reflection, is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge, having been acquired through the perception of others.<sup>2</sup> It is not easy to conceive, that the Supreme Being, whose wisdom is so conspicuous in all His works, constituted man to believe only upon his own personal experience; since, in that case, the world could neither be governed nor improved; and society must remain in the state in which it was left by the first generation of men. On the contrary, during the period of childhood we believe implicitly almost all that is told us; and we thus are furnished with information, which we could not otherwise obtain, but which is necessary at the time for our present protection, or as the means of future improvement. This disposition to confide in the veracity of others, and to believe what they say, may be termed *instinctive*. At an early period, however, we begin to find that of the things told to us some are not true; and thus our implicit reliance on the testimony of others is weakened; first, in regard to particular things, in which we have been deceived; then, in regard to persons, whose falsehoods we have detected; and, as these instances multiply upon us, we gradually become more and more distrustful of statements made to us, and learn by experience the necessity of testing them by certain rules.<sup>3</sup> "Confidence,"

<sup>1</sup> Gr. Ev. § 7, nearly verbatim.<sup>2</sup> Id. Part 2, § 3, p. 73.<sup>3</sup> Abercr. on Intell. Pow., Part p. 42.

exclaimed Lord Chatham, on a memorable occasion, "is a plant of slow growth in an aged bosom;" and indeed, it may be generally observed, that, as our ability to obtain knowledge by other means increases, our instinctive and indiscriminate reliance on testimony diminishes, by yielding to a more rational belief.<sup>1</sup> Still, in every

<sup>1</sup> \* Gamb. Guide, 87; M'Kinnon, Phil. of Ev. 40. This subject is treated more largely by Dr. Reid in his profound Inquiry into the Human Mind, c. 6, § 24, pp. 196, 197, of his collected Works, in these words:—"The wise and beneficent Author of Nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath, for these purposes, implanted in our nature two principles, that tally with each other. The first of these principles is a propensity to speak truth, and to use the signs of language, so as to convey our real sentiments. This principle has a powerful operation, even in the greatest liars; for where they lie once they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art of training, no inducement or temptation, but only that we yield to a natural impulse. Lying, on the contrary, is doing violence to our nature; and is never practised, even by the worst men, without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end; but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end, which he cannot otherwise attain. If it should be objected, that men may be influenced by moral or political considerations to speak truth, and therefore, that their doing so is no proof of such an original principle as we have mentioned; I answer, first, that moral or political considerations can have no influence, until we arrive at years of understanding and reflection; and it is certain from experience, that children keep to truth invariably, before they are capable of being influenced by such considerations. Secondly, when we are influenced by moral or political considerations, we must be conscious of that influence, and capable of perceiving it upon reflection. Now, when I reflect upon my actions most attentively, I am not conscious, that in speaking truth I am influenced on ordinary occasions by any motive moral or political. I find, that truth is always at the door of my lips, and goes forth spontaneously, if not held back. It requires neither good nor bad intention to bring it forth, but only that I be artless and undesigning. There may indeed be temptations to falsehood, which would be too strong for the natural principle of veracity, unaided by principles of honour or virtue; but where there is no such temptation, we speak truth by instinct; and this instinct is the principle I have been explaining. By this instinct, a real connection is formed between our words and our thoughts, and thereby the former become fit to be signs of the latter, which they could not otherwise be. And although this connection is broken in every instance of lying and equivocation, yet these instances being comparatively few, the authority of human testimony is only weakened by them, but not destroyed. Another original

\* Gr. Ev. § 7, n. verbatim.

period of life and in every state of intellectual culture, man is instinctively more prone to believe than to disbelieve the testimony of others, and this disposition towards credulity may be regarded principle, implanted in us by the Supreme Being, is a disposition to confide in the veracity of others, and to believe what they tell us. This is the counter-part to the former: and as that may be called the principle of veracity, we shall, for want of a proper name, call this the principle of credulity. It is unlimited in children until they meet with instances of deceit and falsehood; and it contains a very considerable degree of strength through life. If nature had left the mind of the speaker in equilibrio, without any inclination to the side of truth more than to that of falsehood, children would lie as often as they speak truth, until reason was so far ripened, as to suggest the imprudence of lying, or conscience, as to suggest its immorality. And if nature had left the mind of the hearer in equilibrio, without any inclination to the side of belief more than to that of disbelief, we should take no man's word, until we had positive evidence that he spoke truth. His testimony would, in this case, have no more authority than his dreams, which may be true or false: but no man is disposed to believe them, on this account, that they were dreamed. It is evident, that, in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself, when there is nothing put into the opposite scale. If it was not so, no proposition, that is uttered in discourse would be believed, until it was examined and tried by reason: and most men would be unable to find reasons for believing the thousandth part of what is told them. Such distrust and incredulity would deprive us of the greatest benefits of society, and place us in a worse condition than that of savages. Children, on this supposition, would be absolutely incredulous, and therefore absolutely incapable of instruction; those who had little knowledge of human life, and of the manners and characters of men would be in the next degree incredulous; and the most credulous men would be those of greatest experience, and of the deepest penetration; because, in many cases, they would be able to find good reasons for believing testimony, which the weak and the ignorant could not discover. In a word, if credulity were the effect of reasoning and experience, it must grow up and gather strength, in the same proportion as reason and experience do. But if it is the gift of nature, it will be strongest in childhood, and limited and restrained by experience; and the most superficial view of human life shows, that the last is really the case, and not the first. It is the intention of nature, that we should be carried in arms before we are able to walk upon our legs; and it is likewise the intention of nature, that our belief should be guided by the authority and reason of others, before it can be guided by our own reason. The weakness of the infant, and the natural affection of the mother, plainly indicate the former; and the natural credulity of youth and authority of age as plainly indicate the latter. The infant, by proper nursing and care, acquires strength to walk without support. Reason hath likewise her infancy, when she must be carried in arms; then she leans entirely upon authority, by natural instinct, as if she was conscious of her own weakness; and without this support, she becomes vertiginous. When brought to maturity by proper culture, she begins to feel her own strength, and leans less upon the reason of others; she learns to suspect testimony in some cases, and to disbelieve it in others; and sets bounds

as a fundamental principle of our moral nature, implanted in us by the Almighty for the wisest and most beneficent purposes. As such it constitutes the general basis upon which all evidence may be said to rest.

§ 51.<sup>1</sup> Subordinate to this paramount and original principle, it may, in the *second* place, be observed, that evidence rests upon our *faith in human testimony, as sanctioned by experience*; that is, upon the generally experienced truth of the statements on oath of men of integrity, having capacity and opportunity for observation, and without apparent influence from passion or interest to pervert the truth. This belief is strengthened by our knowledge of the narrator's reputation for veracity and intelligence, by the absence of conflicting testimony, and by the presence of that which is corroborating and cumulative.<sup>2</sup> § 43

§ 52. It is obvious, that, in the hasty progress of a trial at Nisi Prins, it is frequently difficult, and sometimes impossible, to ascertain, with anything like certainty, what characters the witnesses respectively deserve for honesty and intelligence, and how far they are actuated by interested, malignant, or other improper motives. On these heads considerable doubts must almost always § 44

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to that authority to which she was at first entirely subject. But still, to the end of life, she finds a necessity of borrowing light from testimony, where she has none within herself, and of leaning in some degree upon the reason of others, where she is conscious of her own imbecility. And, as in many instances Reason, even in her maturity, borrows aid from testimony; so in others she mutually gives aid to it, and strengthens its authority. For, as we find good reason to reject testimony in some cases, so in others we find good reason to rely upon it with perfect security in our most important concerns. The character, the number, and the disinterestedness of witnesses, the impossibility of collusion, and the incredibility of their concurring in their testimony without collusion, may give an irresistible strength to testimony, compared to which its native and intrinsic authority is very inconsiderable."

<sup>1</sup> Gr. Ev. § 10, nearly verbatim.

<sup>2</sup> Archbishop Whately, in his admirable *jeu d'esprit*, entitled "Historic Doubts relative to Napoleon Buonaparte," has clearly stated the main tests of human veracity. "I suppose," says he, "it will not be denied that the three following are among the most important points to be ascertained, in deciding on the credibility of witnesses; first, whether they have the means of gaining correct information; secondly, whether they have any interest in concealing truth, or propagating falsehood; and, thirdly, whether they agree in their testimony."—P. 14, 6th ed.

exist; although a rigid cross-examination, when skilfully applied,<sup>1</sup> will certainly throw much light upon the subject; and a careful attention to the demeanour of the witness will furnish a no less valuable guide. Thus, while simplicity, minuteness, and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually laboured, cautious, and indistinct.<sup>2</sup> So, when we find a witness over zealous on behalf of his party; exaggerating circumstances; assuming an air of bluster and defiance;<sup>3</sup> answering without waiting to hear the question; forgetting facts where he would be open to contradiction; minutely remembering others, which he knows cannot be disputed;<sup>4</sup> reluctant in giving adverse testimony; replying evasively or flippantly;<sup>5</sup> pretending not to hear the question, for the purpose of gaining time to consider the effect of his answer; affecting indifference; or, often vowing to God,<sup>6</sup> and protesting his honesty; we have indications, more or less conclusive, of insincerity and falsehood.<sup>7</sup> On the other hand, in the testimony of witnesses of truth there is a calmness and simplicity; a naturalness of manner; an unaffected readiness and copiousness of detail, as well in one part of the narrative as another; and an evident disregard of either the facility or difficulty of vindication or detection.<sup>8</sup>

§ 53. Besides these tests of truth, which are obviously of value § 45  
in fixing what amount of credit is due to each *individual* witness,

<sup>1</sup> In the great Tichborne trial of 1871, the cross-examination of Mr. Baigent by Mr. Hawkins should be carefully studied, as being the best modern example of forensic ability in that line.

<sup>2</sup> Channing, *Ev. of Christ.*, 3rd vol. of Works, 356.

<sup>3</sup> "Asseveration blustering in your face  
Makes contradiction such a hopeless case."

COWPER, *Conversation*.

<sup>4</sup> "For, when we risk no contradiction,  
It prompts the tongue to deal in fiction."

GAY's *Fables*, Part I., Fable x.

<sup>5</sup> "All persons who have been accustomed to see witnesses in a court of justice know, that those who are stating falsehoods are extremely apt to give flippant and impertinent answers." Per Mr. Brougham on the Queen's trial; 1 *Ld. Br. Sp.* 159.

<sup>6</sup> "And even when sober truth prevails throughout,  
They swear it, till affirmation breeds a doubt."

COWPER, *Conversation*.

<sup>7</sup> 1 *St. Ev.* 547.

<sup>8</sup> Greenl. on *Test. of Evang.* § 40.

certain general rules must be borne in mind, as tending to shadow forth, rather than define, the relative merits of particular *classes of witnesses*. Thus, it has been justly observed, that a "propensity to lying has been always, more or less, a peculiar feature in the character of an enslaved people,—accustomed to oppression of every kind, and to be called upon to render strict account of every trifle done, not according to the rules of justice, but as the caprice of their masters may suggest ;—it is little to be wondered at, if a lie is often resorted to as a supposed refuge from punishment, and that thus an habitual disregard is engendered."<sup>1</sup> This passage is cited, as accounting in some measure for the lamentable neglect of truth, which is evinced by most of the nations of India, by the subjects of the Czar, and by many of the peasantry in Ireland.<sup>2</sup>

§ 54. Again, as the chief motive for exaggeration springs from an innate vain love of the marvellous,<sup>3</sup> and as this love, like all other, is most remarkable in the softer sex,<sup>4</sup> a prudent man will, in general, do well to weigh with some caution the testimony of *female witnesses*. This care is all the more necessary, in consequence of the extensive and dangerous field of falsehood which is opened up by mere exaggeration; for, as truth is made the groundwork of the picture, and fiction lends but light and shade, it often requires more patience and acuteness than most men possess, or are willing to exercise, to distinguish fact from fancy, and to repaint the narrative in its proper colours.<sup>5</sup> In short, the intermixture of

<sup>1</sup> Bp. of Tasmania's Lect. on Christ. Catechism, 519.

<sup>2</sup> The Antiquarian loves to trace the Irish blood from a Carthaginian stock.

<sup>3</sup> Bp. of Tasmania's Lecture on Christ. Catechism, 522.

<sup>4</sup> The woman of Samaria affords a striking example of this proneness to exaggerate. When our Saviour told her she had had five husbands, she went into the city, saying, "Come, see a man, which told me *all things that ever I did*." 4th ch. of St. John, v. 29.

<sup>5</sup> Bp. of Tasmania's Lect. on Christ. Catechism, 522. The difficulty of detecting falsehood which has been engrafted on truth has been noticed by Alfred Tennyson, in his charming poem of the "Grandmother :"—

"and the parson . . . said likewise,

That a lie which is half a truth is ever the blackest of lies,  
That a lie which is all a lie may be met and fought with outright,  
But a lie which is part a truth is a harder matter to fight."

Mr. Brougham commented on the same subject with great ability on the (2942)



truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent.<sup>1</sup> Having pointed out this proneness to exaggerate as a feminine weakness, it is only just to add, that in other respects, the testimony of women is at least deserving of equal credit to that of men. In fact, they are in some respects far superior witnesses; for first, they are, in general, closer observers of events than men; next, their memories, being less loaded with matters of business, are usually more tenacious; and lastly, they often possess unrivalled powers of simple and unaffected narration.<sup>2</sup>

§ 55. Sir William Blackstone appears to have thought,<sup>3</sup> that § 47  
less credit was due to the testimony of a *child* than to that of an adult; but reason and experience scarcely warrant this opinion. In childhood, the faculties of observation and memory are usually more active than in after life, while the motives of falsehood are then less numerous and less powerful. The inexperience and artlessness, which, in a great measure, must accompany tender years, render a child incapable of sustaining consistent perjury, while the same causes operate powerfully in preventing his true testimony from being shaken by the adroitness of counsel. Not comprehending the drift of the questions put to him in cross-examination, his only course is to answer them according to the

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Queen's trial. "If an individual," said he, "were to invent a story entirely,—if he were to form it completely of falsehoods, the result would be his inevitable detection; but if he build a structure of falsehood on the foundation of a little truth, he may raise a tale which, with a good deal of drilling, may put an honest man's life, or an illustrious Princess' reputation, in jeopardy." 1 *Ld. Br. Sp.* 147. And, again: "The most effectual way, because the safest, of laying a plot, is not to swear too hard, is not to swear too much, or to come too directly to the point; but to lay the foundation in existing facts and real circumstances,—to knit the false with the true,—to interlace reality with fiction,—to build the fanciful fabric upon that which exists in nature,—and to escape detection by taking most especial care, as they have done here, never to have two witnesses to the same facts, and also to make the facts as moderate, and as little offensive, as possible." 1 *Ld. Br. Sp.* 215.

<sup>1</sup> *Bp. of Tasmania's Lect. on Christ. Catechism*, 522.

<sup>2</sup> Take, for instance, the Letters of Madame de Sévigné, or Lady Mary Wortley Montagu, which can only be rivalled, if at all, by those of the effeminate *Ld. Orford*.

<sup>3</sup> 4 *Bl. Com.* 214.

fact. Thus, if he speak falsely, he is almost inevitably detected; but if he be the witness of truth, he avoids that imputation of dishonesty, which sometimes attaches to older witnesses, who, though substantially telling the truth, are apt to throw discredit on their testimony, by a too anxious desire to reconcile every apparent inconsistency.

§ 56. The testimony of foreigners and of others, who, living out of the jurisdiction, are brought from a distance to the place of trial, often requires to be scrutinised with more than common caution; for, as such persons speak before a tribunal, which ordinarily knows no more of them than they care for it, whose threat they have no reason to fear, and whose good opinion they utterly disregard, they are obviously far less likely than witnesses living on the spot to be influenced by the dread of having their falsehoods exposed.<sup>1</sup> The detection of perjury, in their case, involves but little loss of character, and no real danger of punishment. A dishonest foreigner, too, who has attained a tolerable knowledge of the language, has always this advantage over a native, that he may modestly conceal his proficiency as a linguist, and avail himself of the assistance of an interpreter, which gives him an opportunity of preparing with due caution his answer to any inconvenient question, while the interpreter, all unheeded, is performing the superfluous part of furnishing him with a needless translation.<sup>2</sup> § 48

§ 57. With respect to *policemen*, *constables*, and others employed in the suppression and detection of crime, their testimony against a prisoner should usually be watched with care; not because they intentionally pervert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious, and by the frequent contemplation of human nature in its most revolting form, almost necessarily leads them to ascribe actions to the worst motives, and to give a colouring of guilt to facts and conversations, which are, § 49

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<sup>1</sup> Per Mr. Brougham on the Queen's trial. 1 Ld. Br. Sp. 126. See *id.* p. 241.

<sup>2</sup> *Id.* 168. See *R. v. Burke*, 8 Cox, 44, 47, cited post, § 1444.

perhaps, in themselves consistent with perfect rectitude.<sup>1</sup> "That all men are guilty, till they are proved to be innocent," is naturally the creed of the police: but it is a creed which finds no sanction in a court of justice. As a set-off to this tendency on the part of the police to regard conduct in the worst point of view, it must in fairness be stated, that, in every other respect, the general mode in which they give their testimony is unimpeachable; and that, except when blinded by prejudice, they may well challenge a comparison with any other body of men in their rank of life, as upright, intelligent, and trustworthy witnesses.

§ 58. Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions*; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think: but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion. Being zealous partisans, their Belief becomes synonymous with Faith as defined by the Apostle,<sup>2</sup> and it too often is but "the substance of things *hoped for*, the evidence of things *not seen*." To adopt the language of Lord Campbell, "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."<sup>3</sup> § 50

§ 59. A *third* ground of the credibility of evidence is afforded by the exercise of reason upon the effect of *coincidences in the testimony of independent witnesses*. These coincidences, when sufficiently numerous, and presented in the shape of undesigned correspondency, or incidental allusion, necessarily produce a prodigious effect in enforcing belief; because, if the witnesses had concerted a plot, the coincidences would almost inevitably have been converted § 51

<sup>1</sup> See post, § 68.

<sup>2</sup> Ep. to the Hebrews, c. xi., v. 1.

<sup>3</sup> Tracy Peer. 10 Cl. & Fin. 191. See post, § 68.

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by cross-examination into contradictions,<sup>1</sup> and if collusion is excluded, and no deception has been practiced on the witnesses, the harmony in their evidence cannot be explained upon any other hypothesis than that the statements severally made are true. Each witness taken singly may be notorious for lying; but the chances against their all agreeing by accident in the same lie may be so great, as to render the agreement morally impossible.<sup>2</sup> On this subject it has been profoundly remarked, that "in a number of concurrent testimonies, where there has been no previous concert, there is a probability distinct from that which may be termed the sum of the probabilities resulting from the testimonies of the witnesses; a probability which would remain, even though the witnesses were of such a character as to merit no faith at all. This probability arises purely from the concurrence itself. That such a concurrence should spring from chance, is as one to infinite; that is, in other words, morally impossible. If, therefore, concert be excluded, there remains no cause but the reality of the fact."<sup>3</sup>

§ 80. So, also, Lord Mansfield justly observed on one occasion, § 51  
 "It is objected that the books [Keble's and Freeman's Reports] are of no authority; but if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstration of the truth of what they report, or they could not agree."<sup>4</sup> The word "substantially" here used is highly important, with a view to the question of collusion, since it is scarcely possible that several independent witnesses should tell precisely the same tale, without any variation. Dr. Paley, who has treated this subject with great ability in his *Evidences of Christianity*, states,

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<sup>1</sup> On this subject Mr. Brougham thus expressed himself on the Queen's trial:—"Why were there never two witnesses to the same fact? Because it is dangerous; because, when you are making a plot, you should have one witness to a fact, and another to a confirmation; have some things true, which unimpeachable evidence can prove; other things fabricated, without which the true would be of no avail,—but avoid calling two witnesses to the same thing at the same time, because the cross-examination is extremely likely to make them contradict each other." 1 *Ld. Br. Sp.* 215.

<sup>2</sup> *Aber. on Intell. Pow.*, Part 2, § 3, p. 91.

<sup>3</sup> *Campbell's Philos. of Rhetoric*, ch. v., b. 1, par. 3, p. 125; *Whately's Rhetoric*, Part 1, ch. 2, § 4, pp. 58, 59.

<sup>4</sup> *R. v. Genge*, 1 *Cowp.* 16.

that "the usual character of human testimony is *substantial truth under circumstantial variety*. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud."<sup>1</sup> These last observations apply with almost overwhelming force, when the facts deposed to consist of conversations, or of a series of trifling and unimportant events, and the testimony is given after the lapse of a considerable interval of time.<sup>2</sup>

§ 61.<sup>3</sup> *Fourthly*, in receiving the knowledge of facts from the testimony of others, men are much influenced by their *accordance with facts previously known or believed*; and this constitutes what is termed their *probability*. Statements, thus probable, are received upon evidence much less cogent than is required for the belief of those which do not accord with previous knowledge; but while such statements are more readily received, and justly relied upon, care should be taken lest all others be unduly distrusted. While unbounded credulity is the attribute of weak minds, which seldom think or reason at all,—quo magis nesciunt, eo magis admirantur,—indiscriminate scepticism belongs only to those who, affecting to make their own knowledge and observation the exclusive standard of probability, forget that they are liable to be misled even by their own senses.<sup>4</sup> Such persons, therefore, if they intend to sustain a truly consistent character, should act like Molière's Docteur, in "Le Mariage Forcé," who, in answer to Sganarelle's statement that he had come to see him, replied, "Seigneur Sganarelle, changez,

<sup>1</sup> Part 3, ch. 1, p. 158.

<sup>2</sup> See further on this interesting subject, Greenl. on Test. of Evang. §§ 34—36.

<sup>3</sup> Gr. Ev. § 8, in great part.

<sup>4</sup> Aberr. on Intell. Pow., Part 2, § 3, p. 74. Channing, on Ev. of Revealed Relig., 3d vol. of Works, p. 116, observes—"All my senses have sometimes given false reports."

s'il vous plait, cette façon de parler. Notre philosophe ordonne de ne point énoncer de proposition décisive, de parler de tout avec incertitude, de suspendre toujours son jugement; et par cette raison vous ne pouvez pas dire, je suis venu, mais, *il me semble* que je suis venu."<sup>1</sup> Sceptical philosophers, however, inconsistently enough with their own principles, yet true to the nature of man, continue to receive a large portion of their knowledge upon testimony, derived, not from their own experience, but from that of other men; and this, even when it is at variance with much of their own personal observation. Thus they receive with confidence the testimony of the historian in regard to the occurrences of ancient times; that of the naturalist and the traveller, in regard to the natural history and civil condition of other countries; and that of the astronomer, respecting the heavenly bodies; facts which, upon the narrow basis of their own "firm and unalterable experience," on which Mr. Hume so much relies, they would be bound to reject, as wholly unworthy of belief.<sup>2</sup>

§ 62. Still, it is not the miscalled philosopher alone, who is too ready to lend an academic faith to a narrative of facts, which do not strictly accord with preconceived opinions, mistaken for knowledge. In all ranks and conditions of life, persons of this stamp abound, and the errors, to which their habits of distrust expose them, are at times sufficiently ridiculous. Thus, the king of Siam rejected the testimony of the Dutch ambassador, that, in his country, water was sometimes congealed into a solid mass; for it was utterly repugnant to his own experience.<sup>3</sup> In like manner, the marvellous but true stories narrated by the Abyssinian traveller Bruce, were long considered by his countrymen as mere fictions; and so late as the year 1825, the evidence given by the great railway engineer, George Stephenson, before a parliamentary committee, was much impaired by his having ventured an opinion, that steam-carriages might possibly travel on railroads twelve miles an hour.<sup>4</sup> A contemplation of the instances here given, and of others which will readily occur

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<sup>1</sup> Scène 8.

<sup>2</sup> Abercr. on Intell. Pow., Part 2, § 3, pp. 79, 80.

<sup>3</sup> Id. p. 75.

<sup>4</sup> Life of George Stephenson, by Samuel Smiles, 1857, ch. 19.

to the reader, naturally suggests two reflections ; first, that, with man's finite knowledge, he should be slow to reject a narrative as incredible, merely because it is beyond, or even contrary to, his own very limited experience ; and next, that progress in knowledge is not confined, in its results, to the simple facts ascertained, but has also an extensive influence in enlarging the understanding for the further reception of truth, and in setting it free from many of the prejudices which influence men, whose minds are limited by a narrow field of observation. Thus, Archimedes, deeply imbued as he was with science, might have believed an account of the invention and wonderful powers of the steam-engine, which unscientific Englishmen of the last century would have rejected as incredible and absurd.<sup>1</sup>

§ 63.<sup>2</sup> A *fifth* basis of evidence is the known and experienced § 54  
*connexion* subsisting between collateral facts or circumstances, satisfactorily proved, and the fact in controversy. This is merely the legal application, in other terms, of a process familiar in natural philosophy, showing the truth of an hypothesis by its coincidence with existing phenomena. The connexion and coincidences in question may be either physical or moral ; and the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual, and moral constitution and habits of man.<sup>3</sup> Their force, which will be considered hereafter,<sup>4</sup> depends upon their sufficiency to exclude every other hypothesis but the one under consideration. Thus, the possession of goods recently stolen, accompanied with personal proximity in point of time and place, and inability in the party charged, to show how he came by them, would seem naturally, though not necessarily,<sup>5</sup> to

<sup>1</sup> Abercr. on Intell. Pow., Part 2, § 3, pp. 75, 76. So Voltaire shrewdly observes :—"Là où le vulgaire rit, le philosophe admire ; et il rit où le vulgaire ouvre de grands yeux stupides d'étonnement." Vol. 42, p. 142.

<sup>2</sup> Gr. Ev. § 11, verbatim, except the notes.

<sup>3</sup> For an amusing example of a fact proved by a long chain of circumstantial evidence, see Voltaire's *Zadig*, ch. 3.

<sup>4</sup> Post, §§ 64—69.

<sup>5</sup> Joseph's cup was found in Benjamin's sack, Gen. c. 44, v. 1—17. The amusing story of the Hunchback, in the Arabian Nights, and the no less diverting story of the Baked Head, in Mr. Morier's *Hajji Baba*, both turn on

exclude every other hypothesis, but that of his guilt. But the possession of the same goods at another time and place would warrant no such conclusion, as it would leave room for the hypothesis of their having been lawfully purchased in the course of trade. Similar to this, in principle, is the rule of *noscitur a sociis*, according to which the meaning of certain words in a written instrument is ascertained by the context.

§ 64.<sup>1</sup> In considering this subject, it must always be borne in mind, that in the actual occurrences of human life nothing is inconsistent. Every event, which actually transpires, has its appropriate relation and place in the vast complication of circumstances of which the affairs of men consist; it owes its origin to those which have preceded it; it is intimately connected with many others which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others which succeed.<sup>2</sup> In all this system of inter-dependence perfect harmony prevails; so that a man can hardly invent a story, which, if closely compared with all the actual contemporaneous and successive occurrences, may not be shown to be false. From these causes, minds enlarged by long and mature experience, and close observation of the conduct and affairs of men, may, with a rapidity and certainty approaching to intuition, perceive the elements of truth or falsehood in the face itself of the narrative, without any regard to the narrator. Thus, an experienced judge may instantly discover the falsehood of a witness, whose story an inexperienced jury might be inclined to believe. But though the mind, in these cases, seems to have acquired a new power, it is properly to be referred only to experience and observation. § 55

§ 65.<sup>3</sup> In trials of fact, it will generally be found that the *factum probandum* is either directly attested by those who speak from their own actual and personal knowledge of its existence, or it is to be § 56

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an erroneous presumption of guilt arising from recent possession. See, too, Smollett's *Roderick Random*, ch. xxi.

<sup>1</sup> Gr. Ev. § 12, in great part.

<sup>2</sup> 1 St. Ev. 560; 3 Channing's Works, 133, 340.

<sup>3</sup> Gr. Ev. § 13, in great part.



inferred from other facts, satisfactorily proved. In the former case, the proof rests upon the *second*, *third*, and *fourth* grounds of belief before mentioned; that is, it depends partly, upon faith in human testimony, as sanctioned by experience;—which faith will be increased or diminished in proportion to the apparent honesty and intelligence of the witnesses, and their opportunities for observation;—partly, upon the exercise of reason on the consistency of the narratives given by different witnesses;—and here the value of the testimony will vary, according to the number of the deponents, and the apparent absence or presence of collusion;—and partly, upon the conformity of the testimony with experience. In the latter case,—that is, when the fact in dispute is to be inferred from other facts satisfactorily established,—the proof rests upon the same grounds, with the addition of the experienced connexion between the collateral facts thus proved, and the fact which is in controversy; which connection constitutes the *fifth* basis of evidence before stated. The facts proved are in both cases directly attested. In the former case, the proof applies immediately to the *factum probandum*, without any intervening process, and it is therefore called *direct* or *positive* testimony. In the latter case, as the proof applies immediately to collateral facts, supposed to have a connexion, near or remote, with the fact in controversy, it is termed *circumstantial*; and sometimes, but not with entire accuracy, *presumptive*. Thus, if a witness testifies that he saw A. inflict a mortal wound on B., of which he instantly died, this is a case of direct evidence; and, giving to the witness the credit to which men are generally entitled, the crime is satisfactorily proved. If a witness testifies that a deceased person was shot with a pistol, and the wadding is found to be part of a letter addressed to the prisoner, the residue of which is discovered in his pocket, here the facts themselves are directly attested; but the evidence they afford is termed *circumstantial*; and from these facts, if unexplained by the prisoner, the jury may, or may not, *deduce*, or *infer*, or *presume* his guilt, according as they are satisfied, or not, of the natural connexion between similar facts and the guilt of the person thus connected with them. In both cases, the veracity of the witness is *presumed*, in the absence of proof to the contrary; but in the latter case there is an additional presumption or inference, founded on the

known usual connexion between the facts proved, and the guilt of the party implicated. This operation of the mind, which is more complex and difficult in the latter case, has caused the evidence afforded by circumstances to be termed presumptive evidence; though, in truth, the operation is similar in both cases.

§ 66. Much has been said and written respecting the comparative value of direct and circumstantial evidence; but as the controversy seems to have arisen from a misapprehension of the real nature and object of testimony, and can moreover lead to no practical end, it is not here intended to enter into the lists further than to observe, that one argument urged in favour of circumstantial evidence is palpably erroneous. "Witnesses may lie, but circumstances cannot,"<sup>1</sup> has been more than once repeated from the bench, and is now almost received as a judicial axiom. Yet certainly no proposition can be more false or dangerous than this. If "circumstances" mean,—and they can have no other meaning,—those facts which lead to the inference of the fact in issue, they not only can, but constantly do lie; or, in other words, the conclusion deduced from them is often false. Thus, when at Melita the viper fastened on St. Paul's hand, the barbarians said among themselves, "*No doubt this man is a murderer;*" but when they saw that no harm came to him, "they changed their minds, and said that he was a god."<sup>2</sup> Here, both conclusions were alike false. So, in Macbeth, the master poet of nature has described Lenox, Macduff, and the other chieftains as erroneously assuming, first, that the grooms had murdered the King, because "their hands and faces were all badged with blood, so were their daggers, which unwiped we found upon their pillows:"<sup>3</sup> and next, that "they were suborned" by the king's two sons, who had "stolen away and fled."<sup>4</sup> It is no answer to say that these are mere instances of hasty and illogical inferences, which display only the ignorance and presumption of the persons by

<sup>1</sup> *Annesley v. Ld. Anglesea*, 17 How. St. Tr. 1430, per Mountenoy, B.; *R. v. Blandy*, 18 How. St. Tr. 1187, per Legge, B.

<sup>2</sup> The Acts, xxviii. 3—5. So, when Jacob saw Joseph's coat of many colours stained with kid's blood, "he knew it, and said, 'It is my son's coat; an evil beast hath devoured him; Joseph is *without doubt* rent in pieces.'" Gen. xxvii. 33.

<sup>3</sup> Act ii., sc. 3.

<sup>4</sup> Act ii., sc. 4.

whom they were drawn, and that the "circumstances which cannot lie" are such as *necessarily* lead to a certain conclusion. Who is to decide on this necessity? Clearly those who have also to decide on the fact in issue. Throw a case of circumstantial evidence into the form of a syllogism, and it will be found that the major premiss rests solely on the erring experience of the tribunal to whom it is presented. Besides, these very circumstances must be proved, like direct facts, by witnesses, who are equally capable with others of deceiving<sup>1</sup> or of being deceived. So that in no sense is it possible to say, that a conclusion drawn from circumstantial evidence can amount to absolute certainty, or in other words, that circumstances cannot lie.

§ 67. Although it is not here proposed to take any part in the controversy respecting the comparative weight due to direct and circumstantial evidence; still, it may not be without some advantage to point out briefly the dangers against which juries should especially guard, when called upon to decide cases supported by each of these species of testimony. For instance, in a case sought to be directly established, the witnesses are usually few, and consequently there is the more reason to apprehend conspiracy and fraud; since two or three persons are far more easily found than a larger number, who, from motives of interest or malignity, will combine to aggrandise themselves or to ruin an opponent. Their story, too, being for the most part simple, is readily concocted and remembered, § 58

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<sup>1</sup> Iago's story of the handkerchief, which goaded Othello to madness, will occur to everyone:—

"IAGO. Have you not sometimes seen a handkerchief,  
Spotted with strawberries, in your wife's hand?

OTHELLO. I gave her such a one; 'twas my first gift.

IAGO. I knew not that; but such a handkerchief,  
(I am sure it was your wife's,) did I to-day  
See Cassio wipe his beard with.

OTHELLO. If it be that,—

IAGO. If it be that, or any that was hers,  
*It speaks against her, with the other proofs.*

OTHELLO. Oh! that the slave had forty thousand lives—  
One is too poor, too weak for my revenge!  
*Now do I see 'tis true."*

OTHELLO, Act iii, Sc. iii.

while its very simplicity renders it extremely difficult, on cross-examination, to detect the imposture. It is on this ground that the uncorroborated statements of single witnesses, especially when they testify to atrocious crimes, such as rape, &c.,<sup>1</sup> or are known, like accomplices,<sup>2</sup> to be persons of bad character, and to have an interest in the result, have ever been regarded with merited distrust, and are now, in practice, generally deemed insufficient to warrant a conviction.

§ 68. With respect to cases supported by circumstantial evidence, § 59 juries should bear in mind, that, although the number of facts drawn from apparently independent sources renders concerted perjury both highly improbable in itself, and easy of detection if attempted;<sup>3</sup> yet, the witnesses in such cases are more likely to make unintentional misstatements, than those who give direct testimony. The truth of the facts they attest depends frequently on minute and careful observation, and experience teaches the danger of relying implicitly on the evidence of even the most conscientious witnesses, respecting dates, time, distances, footprints, handwriting, admissions, loose conversations, and questions of identity. Yet these are the links in the chain of circumstances, by which guilt is in general sought to be established. The number too of the witnesses, who must *all* speak the truth, or some link will be wanting, renders additional caution the more necessary. Besides, it must be remembered, that, in a case of circumstantial evidence, the facts are collected by *degrees*. Something occurs to raise a suspicion against a particular party. Constables and police officers are immediately on the alert, and, with professional zeal, ransack every place and paper, and examine into every circumstance which can tend to establish, not his innocence, but his guilt. Presuming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine, if possible, to bag their game. Innocent actions may thus be misinterpreted,—innocent words misunderstood; and, as men readily believe what they

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<sup>1</sup> 1 Hale, 635.

<sup>2</sup> R. v. Jones, 2 Camp. 132.

<sup>3</sup> Greenl. on Test. of Evang. § 40.

anxiously desire,<sup>1</sup> facts the most harmless may be construed into strong confirmation of preconceived opinions.<sup>2</sup> It is not here asserted that this is frequently the case, nor is it intended to disparage the police. The feelings by which they are actuated, are common to counsel, engineers, surveyors,<sup>3</sup> medical men, antiquarians, and philosophers; indeed, to all persons who first assume that a fact or system is true, and then seek for arguments to support and prove its truth.

§ 69. But, admitting that the facts sworn to are satisfactorily proved, a further, and a highly difficult duty still remains for the jury to perform. They must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion; for it is only on this last hypothesis that they can safely convict the accused.<sup>4</sup>

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<sup>1</sup> This proposition cannot be more strikingly illustrated, than by referring to the credit that was given by the whole civilized world to the lying telegram which, in October, 1854, announced the fall of Sebastopol.

<sup>2</sup> Ante, § 57.

<sup>3</sup> *Waters v. Thorn*, 22 Beav. 547, 556, 557, per Romilly, M. R.

<sup>4</sup> *R. v. Hodge*, 2 Lew. C. C. 227.

## CHAPTER V.

## PRESUMPTIVE EVIDENCE.

§ 70.<sup>1</sup> THE general head of PRESUMPTIVE EVIDENCE is usually § 61  
divided into two branches, namely, *presumptions of law*, and *presumptions of fact*. PRESUMPTIONS OF LAW consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connexion usually found to exist between certain things. The general doctrines of presumptive evidence are not, therefore, peculiar to municipal law, but are shared by it in common with other departments of science. Thus, the presumption of a malicious intent to kill from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connexion which leads to its recognition by the law, without other proof; the presumption, however, having more or less force, in proportion to the universality of the experience. And this has led to the distribution of presumptions of law into two classes, namely, *conclusive* and *disputable*.

§ 71.<sup>2</sup> *Conclusive*, or, as they are elsewhere termed, imperative, § 62  
or absolute presumptions of law, are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases

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<sup>1</sup> Gr. Ev. § 14, verbatim.

<sup>2</sup> Gr. Ev. § 15, verbatim.

in which the long experienced connexion, just alluded to, has been found so general and uniform, as to render it expedient for the common good, that this connexion should be taken to be inseparable and universal. They have been adopted by common consent, from motives of common policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is, that all corroborating evidence is dispensed with, and all opposing evidence is forbidden.<sup>1</sup>

§ 72. Sometimes this common consent is expressly declared § 63 through the medium of the legislature in *statutes*. Thus, under "The Bankruptcy Act, 1869," the registration of a special resolution of the creditors for a liquidation by arrangement, or of an extraordinary resolution for composition, was, in the absence of fraud, conclusive evidence that such resolutions respectively had been duly passed, and that the Act had been complied with.<sup>2</sup> So, under "The Bankruptcy Act, 1883," the approval of the Court, testified by a certificate of the official receiver, is conclusive as to the validity of any composition, or general scheme of arrangement, accepted in pursuance of the Act.<sup>3</sup> All the requisitions of "The Public Schools Act, 1868," in respect to any statutes made by the governing body of a school, "shall be deemed to have been duly complied with," so soon as the statutes themselves have been approved by Her Majesty in Council.<sup>4</sup> So also, under "The Endowed Schools Act, 1869," the order in council approving a scheme is conclusive evidence of its validity;<sup>5</sup> and under "The

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<sup>1</sup> The presumption of the Roman law is defined to be, "*conjectura, ducta ab eo, quod ut plurimum fit. Ea conjectura vel a lege inducitur, vel a iudice. Quæ ab ipsâ lege inducitur, vel ita comparata, ut probationem contrarii haud admittat; vel ut eadem possit elidi. Priorem doctores præsumptionem JURIS ET DE JURE, posteriorem præsumptionem JURIS, adpellant. Quæ a Iudice inducitur conjectura, præsumptio HOMINIS vocari solet; et semper admittit probationem contrarii, quamvis, si alicujus momenti sit, probandi onere relevet.*" Hein. ad Pand., Pars iv. § 124. Of the former, answering to our conclusive presumption, Mascardus observes,—"*Super hâc præsumptione lex firmum sancit jus, et eam pro veritate habet.*" 1 de Prob., Quæst. x. 48. An exception to the conclusiveness of this class of presumptions is allowed by the civil law, when the presumption is met by an admission *in judicio*.

<sup>2</sup> 32 & 33 V., c. 71, § 127.

<sup>3</sup> 46 & 47 V., c. 52, § 18, subs. 9.

<sup>4</sup> 31 & 32 V., c. 118, § 8, subs. 4.

<sup>5</sup> 32 & 33 V., c. 56, § 47.

Valuation Metropolis Act, 1869," "the valuation list for the time being in force shall be deemed to have been duly made."<sup>1</sup> The Act, too, of 16 & 17 V., c. 59, contains a remarkable clause, for it enacts, in § 19, that "any draft or order drawn upon a banker payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable,"—which last words have been held to include the payee's agent, though he may not really be authorised to indorse,<sup>2</sup>—"shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker<sup>3</sup> to prove that such indorsement, or any subsequent indorsement, was made by, or under the direction of, the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof."<sup>4</sup> So, under "The Stamp Act, 1870," "a bill of exchange or promissory note purporting to be drawn or made out of the United Kingdom, is, for the purpose of this Act, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom."<sup>5</sup>

§ 73. Thus, too, by the statutes of limitation,<sup>6</sup> where a debt § 64

<sup>1</sup> 32 & 33 V., c. 67, § 45.

<sup>2</sup> *Charles v. Blackwell*, L. R., 2 C. P. D. 151, per Ct. of App.

<sup>3</sup> This enactment does not protect any other person than a banker who takes a cheque on the faith of a forged indorsement. *Ogden v. Benos*, 9 Law Rep., C. P. 513; 43 L. J., C. P. 259, S. C.

<sup>4</sup> See 45 & 46 V., c. 61, § 60. See also *Hare v. Copland*, 13 Ir. Law R., N. S. 426.

<sup>5</sup> 33 & 34 V., c. 97, § 52. See 45 & 46 V., c. 61, § 4.

<sup>6</sup> 21 J. 1, c. 16; 16 & 17 V., c. 113, § 20, Ir. The first Act enacts, in § 3, that "all actions of trespass quare clausum fregit, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within the time and limitation hereafter expressed, and not after, (that is to say), the said actions upon the case, other than slander, and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass quare clausum fregit, within six years next after the cause of such actions or suit, and not



has been created by simple contract,<sup>1</sup> and has not been distinctly recognised within six years as a subsisting obligation, either in some writing signed by the party chargeable, or his agent, or by part payment,<sup>2</sup> no action can be maintained to recover it; that is, it is conclusively presumed to have been paid. So, all actions on the case, other than slander, actions of trespass to goods or land, and actions of detinue<sup>3</sup> or replevin, must be brought within a like period of six years after the cause of action<sup>4</sup> shall have occurred;<sup>5</sup> and no action can be maintained for an assault or false imprisonment after the lapse of four years;<sup>6</sup> for slander after the lapse of two years;<sup>7</sup> or for compensation to the families of persons killed by accident, after twelve calendar months from the death of the deceased.<sup>8</sup> So, under "The Employers' Liability Act, 1880," compensation for injuries cannot be recovered, unless the action be commenced within six months from the date of the accident, or, in case of death, "within twelve months from the time of death."<sup>9</sup> Again, actions against persons for anything done by them under the authority or in pursuance of any local and personal Act, must be brought within two years after the cause of action shall have accrued, or in the case of continuing damage, within one year after the damage shall have ceased.<sup>10</sup> So,

after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within two years next after the words spoken, and not after." The exception marked in italics, after perplexing the courts for two centuries, and giving rise to numerous conflicting decisions, has at length been repealed by 19 & 20 V., c. 97, § 9.

<sup>1</sup> The St. of Limit. 21 J. 1, c. 16, applies to an action of debt for a penalty under a by-law. *Tobacco-pipe Makers' Co. v. Loder*, 16 Q. B. 765.

<sup>2</sup> 9 G. 4, c. 14, § 1; 19 & 20 V., c. 97, § 13.

<sup>3</sup> See *Wilkinson v. Verity*, 6 Law Rep., C. P. 206; 40 L. J., C. P. 141, S. C.; as to when the cause of action will accrue in detinue.

<sup>4</sup> As to when concealed fraud and non-discovery can be pleaded in reply to a defence under the Stat., see *Gibbs v. Guild*, 51 L. J., Q. B. 228; affd. on App., 51 L. J. Q. B. 313; L. R., 9 Q. B. D. 59, S. C. See, also, *Barber v. Houston*, 14 L. R. Ir. 273.

<sup>5</sup> See ante, p. 87, n. 6.

<sup>6</sup> See id.

<sup>7</sup> See id.

<sup>8</sup> 9 & 10 V., c. 93, § 3, as amended by 27 & 28 V., c. 95.

<sup>9</sup> 43 & 44 V., c. 42, § 4. A notice that injury has been sustained must also be given "within six weeks," though in cases of death, the judge has power to relax the stringency of this last rule.

<sup>10</sup> 5 & 6 V., c. 97, s. 5, passed 10 Aug., 1842, after reciting, that "divers (2959)

any action, prosecution, or proceeding against any person for any act done in pursuance or intended execution of the Army Act, 1881, or of the Militia Act, 1882, must be commenced within twelve months next after the act, neglect, or default complained of, or, in case of a continuance of damage within twelve months next after the ceasing thereof.<sup>1</sup> So, all actions and proceedings against persons acting under any of the statutes passed in 1861, to consolidate the law relating to larceny, malicious injuries, or coin,<sup>2</sup> or under the Naval Prize Act, 1864,<sup>3</sup> the Prison Act, 1865,<sup>4</sup> the Seaman's Clothing Act, 1869,<sup>5</sup> the Municipal Corporations Act, 1882,<sup>6</sup> the Public Health Act, 1875,<sup>7</sup> or the Public Health, Ireland, Act, 1878,<sup>8</sup> must be "commenced within six months after the fact committed;" and no action can "be brought against any justice of the peace, for anything done by him in the execution of his office," unless it be commenced within a like period.<sup>9</sup> Under some of the Metropolitan Police Acts, the right of action is limited to three months from the date of the injury,<sup>10</sup> while four months and two months are the respective limits under "The Contagious Diseases, Animals, Act, 1878,"<sup>11</sup> and "The Customs Consolidation Act, 1876."<sup>12</sup> So, when a judgment has been obtained against a banking copartnership, no execution can issue thereon against any former member of such copartnership, after the expiration of *three*

Acts commonly called public local and personal, or local and personal, Acts, and divers other Acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said Acts respectively," enacts, that "the period within which any action may be brought for anything done, under the authority or in pursuance of any *such* Act or Acts shall be two years, or in case of continued damage, then within one year after such damage shall have ceased."

<sup>1</sup> 44 & 45 V., c. 58, § 170, subs. 1; 45 & 46 V., c. 49, § 46.

<sup>2</sup> 24 & 25 V., c. 96, § 113; c. 97, § 71; c. 99, § 33.

<sup>3</sup> 27 & 28 V., c. 25, § 51.

<sup>4</sup> 28 & 29 V., c. 126, § 50.

<sup>5</sup> 32 & 33 V., c. 57, § 6.

<sup>6</sup> 45 & 46 V., c. 50, § 226.

<sup>7</sup> 38 & 39 V., c. 55, § 264.

<sup>8</sup> 41 & 42 V., c. 52, § 263, Ir.

<sup>9</sup> 11 & 12 V., c. 44, § 8; 12 & 13 V., c. 16, § 8, Ir. In Scotland, under "the Summary Procedure Act, 1864," the period is fixed at two months, 27 & 28 V., c. 53, § 35.

<sup>10</sup> 2 & 3 V., c. 71, § 53; *Barnett v. Cox*, 9 Q. B. 617; *Hazeldine v. Grove*, 3 Q. B. 997; 3 G. & D. 210, S. C.

<sup>11</sup> 41 & 42 V., c. 74, § 55, subs. 1.

<sup>12</sup> 39 & 40 V., c. 36, § 272, as amended by 40 V., c. 13, s. 4.

years next after the person sought to be charged shall have ceased to be a member.<sup>1</sup>

§ 74. In like manner, the right of the Sovereign,<sup>2</sup> and of the Duke of Cornwall,<sup>3</sup> to institute legal proceedings for the recovery of lands, rents, or minerals, is barred, under several special statutes, by uninterrupted possession for a period of sixty, or in certain cases, of one hundred years. The possession, too, of land, or of rents, for the length of time mentioned in the general statutes of limitation, under a claim of absolute title and ownership, constitutes against all subjects of the Crown a conclusive presumption of a valid grant.<sup>4</sup> So the payment of a modus, or

<sup>1</sup> 7 G. 4, c. 46, § 13. See *In re North of Engl. Joint Stock Bank Co.*, ex parte Gouthwaite, 20 L. J., Ch. 188, 192, 193; *Barker v. Buttriss*, 7 Beav. 134.

<sup>2</sup> 9 G. 3, c. 16; 24 & 25 V., c. 62; 39 & 40 V., c. 37, Ir.

<sup>3</sup> 7 & 8 V., c. 105, §§ 73, et seq.; 23 & 24 V., c. 53; 24 & 25 V., c. 62.

<sup>4</sup> This period has been limited differently, at different times; but for many years past, it has been shortened, at successive revisions of the law, both in England and the United States. In 1833 the Act of 3 & 4 W. 4, c. 27, passed; and by § 2 of that Statute all actions to recover land or rent are barred, after twenty years from the time when the right of action accrued; unless, at such time, the plaintiff or the party through whom he claims shall have been under some disability, specified in the Act, in which case he is allowed ten years from the ceasing of the disability; provided that in no case shall an action be brought after forty years from the time when the right first accrued, although the period of ten years shall not have expired. §§ 16 & 17. This statutory rule is extended by §§ 24 & 25, to all claims in equity for the recovery of land; *Magdalen College v. Att.-Gen.*, 28 L. J., Ch. 620; 6 H. of L. Cas. 189, S. C.; and it also applies to a claim for dower; *Marshall v. Smith*, 34 L. J., Ch. 189, per Stuart, V.-C.; to a claim for compensation for equitable waste; *D. of Leeds v. Ld. Amherst*, 2 Phill. 117; and to the claim of an annuity charged upon land by will, the twenty years in this last case being calculated from the death of the testator; *James v. Salter*, 3 Bing. N. C. 544. The sections, however, just referred to do not apply to spiritual or eleemosynary corporations sole, who are empowered by § 29 to bring actions or suits to recover land or rent within two successive incumbencies and six years, or, in case these periods do not amount to sixty years, then within sixty years next after the right of action shall first have accrued. See *Ecclesiæ. Commis. v. Rowe*, 49 L. J., Q. B. 771, per Dom. Pr., overruling S. C., 48 L. J., Q. B. 152. §§ 30—33 limit the time within which advowsons can be recovered, while § 40 enacts, that all moneys charged upon land and legacies shall be deemed satisfied at the end of twenty years, unless some interest shall have been paid, or some written acknowledgment shall

the *adverse*, and as of *right* enjoyment of land tithe-free, for the periods specified in the Act of 2 & 3 W. 4, c. 100,<sup>1</sup> conclusively bars the right of all parties, even the Queen, to recover tithes, unless such payment has been made, or enjoyment had, under an express written consent or agreement.<sup>2</sup>

§ 75. So, also, in the completion of any contract of sale of land, § 65 the period of the commencement of title, which a purchaser may require, or, in the language of conveyancers, the root of title, is now have been given in the meanwhile. Under § 28 no mortgagor shall bring a suit to redeem a mortgage but within twenty years from the time when the mortgagee took possession (See *Kinsman v. Rouse*, L. R., 17 Ch. D. 104; 50 L. J., Ch. 486, S. C.), or from the last written acknowledgment of the mortgagor's title. Mortgagees also may bring actions to recover land at any time within twenty years next after the last payment of any part of the principal or interest secured by the mortgage, 7 W. 4, & 1 V., c. 28; *Doe v. Eyre*, 17 Q. B. 366; *Doe v. Massey*, id. 373; *Ford v. Ager*, 2 New R. 366, per Ex.; 32 L. J., Ex. 269; 2 H. & C. 279, S. C.; provided that such last payment be itself within twenty years from the date of the mortgage; *Hemming v. Blanton*, 42 L. J., C. P. 158; and provided that the payment be made by the mortgagor, or by some person bound to make it on his behalf; *Harlock v. Ashberry*, L. R. 19, Ch. D. 539. See, also, 6 & 7 V., c. 54, and 7 & 8 V., c. 27, which Acts extend to Ireland such of the provisions of 3 & 4 W. 4, c. 27, as were not already in force there, and explain and amend that Act. This period of twenty years has been adopted in most of the United States. See 4 Kent, Com. 188, n. a. The same period in regard to the title to real property, or, as some construe it, only to the profits of the land, is adopted in the Hindoo law. 1 Macnagh. Elem. of Hindoo L. 201. See, as to the Scotch law, 37 & 38 V., c. 94, §§ 13, 34. Under the "Real Property Limitation Act, 1874," 37 & 38 V., c. 57, which came into operation on the 1st January, 1879 (see § 12), the periods of limitation have been greatly reduced, six, twelve, and thirty years having been substituted for the ten, twenty, and forty years mentioned in the Acts of 1833 and 1837.

<sup>1</sup> See *Salkeld v. Johnson*, 2 Ex. R. 256. In this important case, which was an issue out of Chancery, the Barons decided,—1st, That the enjoyment of land, producing titheable matters, without payment of tithe for the period prescribed by the Act stated above, if adverse and as of right, created an indefeasible exemption from tithes, without other proof of the legal origin of the exemption; but, secondly, that the non-payment of tithes of a particular thing for such period, in respect of lands for which tithes of other titheable produce had been paid within the statutable period, did not exempt the payment of the tithes of that particular thing. Subsequently, *Ld. Cottenham*, C., while he confirmed the decision of the Ct. of Ex. on the first point, overruled it on the second. See S. C. reported in 1 Hall & T. 329; 1 M. & Gord. 242, S. C. See, also, *Fellowes v. Clay*, 4 Q. B. 313; 3 G. & D. 407, S. C.; and *Salkeld v. Johnson*, 1 Hare, 196, & 2 Com. B. 749.

<sup>2</sup> See *Toymbee v. Brown*, 3 Ex. R. 117.

fixed by statute at forty years, unless there be some stipulation to the contrary in the contract, or some very special circumstance in the case.<sup>1</sup> Thus, too, by the Prescription Act,<sup>2</sup> the length of time which constitutes the period of legal memory, or in other words, which affords a legal title, has in respect of incorporeal rights<sup>3</sup> been definitely fixed; while by the Act of 3 & 4 W. 4, c. 42,<sup>4</sup> the time

<sup>1</sup> 37 & 38 V., c. 78, § 1.

<sup>2</sup> 2 & 3 W. 4, c. 71,—extended to Ireland by 21 & 22 V., c. 42,—limits the period of legal memory as follows:—In cases of rights of common or other profits or benefits arising out of lands, except tithes, rent, and services, *prima facie* to thirty years, and conclusively to sixty years, unless it shall appear that such rights were enjoyed by some consent or agreement expressly given or made by deed or writing, § 1; in cases of ways or other easements, watercourses, or the use of water, *prima facie* to twenty years, and conclusively to forty years, unless it shall be proved, in like manner, by written evidence, that the same were enjoyed by consent of the owner, § 2; and in case of lights, conclusively to twenty years, unless it shall be proved, in like manner, that the same were enjoyed by consent, § 3. See *Bewley v. Atkinson*, 49 L. J., Ch. 6 per Hall, V.-C.; *affd.* on app. 47 L. J., Ch. 153; *Tapling v. Jones*, 34 L. J., C. P. 342, in Dom. Proc.; 20 Com. B., N. S. 166, S. C.; *Lanfranchi v. Mackenzie*, 26 L. J., Ch. 518; 4 Law Rep., Eq. 421, S. C.; *Aynsley v. Glover*, 44 L. J., Ch. 523. § 4 directs, that the before-mentioned periods shall be deemed those next before some suit or action respecting the claims, and further defines what shall amount to an interruption. § 6 enacts, that no presumption shall be made in support of any claim, upon proof of the enjoyment of the right for any less period than the period mentioned in the Act as applicable to the nature of the claim. § 7 provides for parties who are under legal disabilities. As to what evidence of user is necessary under this Act, see *Lowe v. Carpenter*, 6 Ex. R. 825; *Hollins v. Verney*, L. R., 11 Q. B. D. 715, per Ct. of App.; 53 L. J., Q. B. 430, S. C.; and L. R., 13 Q. B. D. 304, per Ct. of App., S. C.

<sup>3</sup> A right to the passage of air and light to a garden, *Potts v. Smith*, 38 L. J., Ch. 38, per Malins, V.-C.; or of air to a windmill or house, is not within the meaning of this Act, *Webb v. Bird*, 13 Com. B., N. S. 841; *Bryant v. Lefever*, 48 L. J., C. P. 380, per Ct. of App.; L. R., 4 C. P. D. 172, S. C.; nor is a claim of "a free fishery" in the waters of another proprietor, *Shuttleworth v. Le Fleming*, 19 Com. B., N. S. 687.

<sup>4</sup> § 3 enacts, that actions of debt for rent upon an indenture of demise, actions of covenant or debt upon any bond or other specialty, and actions of debt or *scire facias* upon recognisance, shall be brought within twenty years after the cause of such actions or suits; actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estate, or for an escape, or for money levied on any *scire facias*, within six years after the cause of such actions or suits; and actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, within two years after the cause of such actions: "Provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited." § 4, as amended by 19 & 20 V., c. 97, § 10,

within which actions of covenant,<sup>1</sup> and debt on specialties,<sup>2</sup> and actions for penalties,<sup>3</sup> may be brought, is expressly limited. So, where any real or personal estate, subject to trust for a Roman Catholic charity, has been applied upon some trusts connected with that religion for twenty years, but the original trusts cannot be ascertained by any document, a *consistent usage of twenty years* is, by statute, rendered conclusive evidence of the trusts on which the property had been settled.<sup>4</sup> So, under Lord Lyndhurst's Act for regulating suits relating to meeting-houses and other property held for religious purposes by dissenters, *the usage for twenty-five years* immediately preceding any such suit, shall be taken as conclusive evidence that the religious doctrines, opinions, or mode of worship, which for that period had been taught or observed in these houses, may be properly taught or observed, provided the contrary is not declared by the instrument declaring the trusts of such houses, either in express terms or by reference to some other document.<sup>5</sup>

§ 76. Many statutes also limit the period within which particular offenders may be prosecuted. Of these, the Act of 7 W. 3, c. 3, is the most remarkable, as it enacts, that no person shall be prosecuted for any high treason or misprision within the Act, other than a design or attempt to assassinate the Sovereign, unless the bill of indictment be found within three years after the commission of the offence.<sup>6</sup> So, all suits, indictments, or informations, brought or exhibited, for any offence against the Customs Acts, in any

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provides for parties under legal disabilities, and § 5 states the effect of an acknowledgment in writing or part payment. See the Irish Act of 16 & 17 V., c. 113 §§ 20—24; also *Alliance Bk. of Sila v. Carey*, 49 L. J., C. P. 781.

<sup>1</sup> See *In re Baker*, *Collins v. Rhodes*, L. R., 20 Ch. D. 230.

<sup>2</sup> The term "specialty" includes all actions on statutes, as, for instance, an action against a shareholder of a company for calls. *Cork & Bandon Rail. Co. v. Goode*, 13 Com. B. 826; *Shepherd v. Hills*, 26 L. J., Ex. 6.

<sup>3</sup> See, also, as to actions for penalties, 31 El. c. 5, § 5, as limited by 11 & 12 V., c. 43, § 36; and *Robinson v. Curry*, L. R., 7 Q. B. D. 465; 50 L. J., Q. B. 561, per Ct. of App.; reversing S. C., as reported in L. R., 6 Q. B. D. 21, and 50 L. J., Q. B. 9; and overruling *Dyer v. Best*, 1 Law Rep., Ex. 152; 25 L. J., Ex. 105; 4 H. & C. 189, S. C.

<sup>4</sup> 23 & 24 V., c. 134, § 5.

<sup>5</sup> 7 & 8 V., c. 45, § 2. See *Att.-Gen. v. Bunce*, 6 Law Rep., Eq. 563, 571, 572, per Malins, V.-C.

<sup>6</sup> §§ 5 & 6; extended to Scotland, by 7 A., c. 11. See *Fost.*, C. L. 249.

court, or before any justice, must be brought or exhibited within three years next after the date of the offence committed.<sup>1</sup> So, the prosecution for every offence against the night-poaching Act, must be commenced within twelve calendar months, if punishable upon indictment, or otherwise than upon summary conviction.<sup>2</sup> The commencement of the prosecution here spoken of is not the preferring the indictment, but the laying an information,<sup>3</sup> and the obtaining a warrant of apprehension; or at least the issuing a warrant of commitment,<sup>4</sup> and, therefore, where the prisoner was apprehended and committed within the twelve months, though the indictment was preferred after the expiration of that term, it was held that the prosecution was commenced in time.<sup>5</sup> Whether the preferring an indictment which is ignored, would be deemed such a commencement of the prosecution as would warrant the conviction of the party upon a subsequent indictment, preferred more than a year after the offence was committed, may admit of more doubt; and the point, though it has been discussed, has never been determined.<sup>6</sup>

§ 77. Again, every prosecution or indictment for an offence under the English Marriage Act of 1836,<sup>7</sup> or under the "Births and Deaths Registration Act, 1874,"<sup>8</sup> must be commenced within three years after the commission of such offence. So, under the Act for marriages in Ireland, and the registering of such marriages, the § 66A

<sup>1</sup> 39 & 40 V., c. 36, § 257.

<sup>2</sup> 9 G. 4, c. 69, § 4. Now repealed, so far as relates to an offence punishable upon summary conviction, by 47 & 48 V. c. 43, § 4, and Sched. 7 & 8 V., c. 29. See *R. v. Casbolt*, 11 Cox, 385.

<sup>3</sup> See *R. v. Parker*, 33 L. J., M. C. 135; 1 L. & Cave, 459; 9 Cox, 475, S. C.

<sup>4</sup> But see *R. v. Hull*, 2 Fost. & Fin. 16, per Pollock, C. B.

<sup>5</sup> *R. v. Brooks*, 2 C. & Kir. 402, by all the judges; 1 Den. 217, S. C.; *R. v. Austin*, 1 C. & Kir. 621.

<sup>6</sup> *R. v. Kilminster*, 7 C. & P. 228. See *R. v. Mainwaring*, 1 E. B. & E. 474.

<sup>7</sup> 6 & 7 W. 4, c. 85, § 41. Qu.: Whether a prosecution for making a false statement touching the particulars required to be registered on a marriage, must be commenced within three years under 6 & 7 W. 4, c. 86, § 41; *R. v. Ld. Dunboyne*, 3 C. & Kir. 1.

<sup>8</sup> 37 & 38 V., c. 88, § 46. The same law prevails in Ireland, see 43 & 44 V., c. 13, § 36.

limitations of prosecutions are fixed at three years and three months, according as the offences are punishable upon indictment or summary conviction.<sup>1</sup> So, also, no prosecution against any person for making a false declaration, in order to procure a marriage out of the district in which the parties dwell, shall take place after the expiration of eighteen calendar months from the solemnization of such marriage.<sup>2</sup> So, every suit against a clergyman for transgressing the ecclesiastical law, must be commenced within two years after the offence was committed;<sup>3</sup> and here the "commencement of the suit" has been held to mean,—not the issuing of a commission under the Church Discipline Act, or the report of the commissioners, or the filing of articles in the name of the bishop, or even the service of such articles on the accused,—but the actual service upon him of a citation to appear at a certain time and place before a competent tribunal to answer definite charges.<sup>4</sup>

§ 78. Under the "Naval Discipline Act, 1866,"<sup>5</sup> no person, who § 66a has not avoided apprehension or fled from justice, shall be tried for any offence, unless the trial take place within three years from the commission of the offence, or within one year after the offender's return to the United Kingdom, in the event of his having been abroad during such period of three years. So, in pursuance of the Army Act, 1881, no person shall be tried or punished for any offence triable by court-martial committed more than three years before his trial begins, except mutiny, desertion, or fraudulent enlistment; and with respect to the two last-named offences, unless, in the case of desertion, that offence has been committed "on active service," the offender is still protected from trial, if he has subsequently for three years served in an exemplary manner in any corps of the regular forces.<sup>6</sup> But none of these provisions affect the jurisdiction of any civil court.<sup>7</sup> Again, every proceeding against

<sup>1</sup> 7 & 8 V., c. 81, §§ 48 & 78, Ir.; 26 & 27 V., c. 27 § 16, Ir.

<sup>2</sup> 3 & 4 V., c. 72, § 4.

<sup>3</sup> 3 & 4 V., c. 86, § 20. See *Simpson v. Flamank*, 1 Law Rep., P. C. 463; 36 L. J., Ec. C., 28, S. C.

<sup>4</sup> *Denison v. Ditcher*, Dea. & Sw., Ec. R. 334; \**Ditcher v. Denison*, 11 Moo. P. C. R. 324; *Bp. of Hereford v. T—n*, 2 Roberts. Ec. R. 595; 4 Moo. P. C., N. S. 385, S. C.

<sup>5</sup> 29 & 30 V., c. 109, § 54.

<sup>6</sup> 44 & 45 V., c. 58, § 161. *Id.* .  
(2986)



any person for contravening the Corrupt and Illegal Practices Prevention Act, 1883,<sup>1</sup> or Part 12 of "The Municipal Corporations Act, 1882,"<sup>2</sup> must, unless the party absconds, be commenced within one year of the date of the offence, or within three months after the report of the commissioners. So, "in summary proceedings for offences and fines under the Municipal Corporations Act, 1882, the information shall be laid within six months after the commission of the offence."<sup>3</sup> So, the time for instituting summary proceedings under the Merchant Shipping Act, 1854, is limited to six months, unless either of the parties be out of the jurisdiction.<sup>4</sup> Again, under the Public Health Acts of 1875, for England, and 1878, for Ireland, all complaints or informations must be made or laid within six months from the time when the matter arose;<sup>5</sup> under the Mines Regulation Acts of 1872, the limitation is fixed at three months;<sup>6</sup> and under the Factory and Workshop Act, 1878, it ranges from two to three months according to the nature of the offence.<sup>7</sup> Clauses of a similar nature will be found in a vast variety of other statutes, to which it is here considered unnecessary to make particular reference.<sup>8</sup>

§ 79. It may admit of a serious doubt, whether all, or indeed § 67 the majority, of these statutes of limitation depend on the doctrine of presumption. Some of them do so undoubtedly, but others appear to rest solely on the broad ground of general expedience and justice. Interest reipublicæ ut sit finis litium, is a maxim sanctioned by all civilised states: and the legislature, in passing most of these statutes, probably never intended to recognise any legal

<sup>1</sup> 46 & 47 V., c. 51, § 51.

<sup>2</sup> 45 & 46 V., c. 50, § 77. This sect. is now repealed by 47 & 48 V., c. 70, § 38, but is substantially re-enacted by § 30 of that Act, which is in force till the end of 1886.

<sup>3</sup> 45 & 46 V., c. 50, § 219, subs. 1.

<sup>4</sup> 17 & 18 V., c. 104, § 525; *Austin v. Olsen*, 37 L. J., M. C. 34; 3 Law Rep., Q. B. 208; and 9 B. & S. 46, S. C.

<sup>5</sup> 38 & 39 V., c. 55, § 252; 41 & 42 V., c. 52, § 250, Ir.

<sup>6</sup> 35 & 36 V., c. 76, § 63, r. 1; and c. 77, § 34, r. 1. <sup>7</sup> 41 V., c. 16, § 91.

<sup>8</sup> See 11 & 12 V., c. 118, § 3; 1 G. 1, st. 2, c. 5, § 8; 33 G. 3, c. 67, § 8; 4 G. 4, c. 76, § 21; 60 G. 3 & 1 G. 4, c. 1, § 7; 6 A., c. 7, § 3; 23 & 24 V., c. 107, § 32, Ir.; 14 & 15 V., c. 93, § 10, r. 4, Ir.; The Merchandise Marks Act, 1862, 25 & 26 V., c. 88, § 18. In Scotland summary complaints must, in general, be instituted "within six months from the time when the matter of such complaint arose." 27 & 28 V., c. 53, § 24. See, as to the Police Courts in Edinburgh, 30 & 31 V., c. 58, Sch. § 172.

presumption, but the simple object was to check protracted litigation. When a party has been in undisputed possession of property for a considerable length of time, it is harsh to deprive him of that, which, however obtain, has now acquired the character of a vested interest. No presumption of a former grant is necessary to give validity to his title. It rests on the fact of long uninterrupted enjoyment. So, when a person has foregone a claim for many years, there is no need for presuming that he has, in reality, been satisfied; it is sufficient to say that his right to recover is lost by his own negligence. Indeed, the statute of James, which has been held not to discharge the debt, but merely to bar the remedy, is strongly confirmatory of these views.<sup>1</sup> Before leaving this subject, it may be well to notice a celebrated passage from one of Lord Plunket's speeches, relative to the statutes of limitation. "If Time," said his lordship, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the law-giver has placed an hour-glass, by which he metes out incessantly those portions of duration, which render needless the evidence that he has swept away."<sup>2</sup>

§ 80.<sup>3</sup> In other cases, the common consent by which this class of legal presumptions is established, is declared through the medium of the judicial tribunals, it being the *common law* of the land; and these decisions of the court are respected, equally with the enactments of the legislature, as authoritative declarations of an imperative rule of law, against the operation of which no averment or

<sup>1</sup> *Spears v. Hartly*, 3 Esp. 81; *Higgins v. Scott*, 2 B. & Ad. 413.

<sup>2</sup> See "Statesmen of the Time of George III.," by Ld. Brougham, 2nd Ser., p. 227, n. The above passage has been variously rendered in different publications. In the case of *Malone v. O'Connor*, Napier, Ch., cited it as follows:—"Time, with the one hand, mows down the muniments of our titles; with the other, he metes out the portions of duration which render these muniments no longer necessary." Drury's Cas. in Ch., temp. Napier, 644. This version is probably more accurate than any other, as it was furnished to the Chancellor by one of the counsel in the *quare impedit*, on the trial of which Ld. Plunket made use of the imagery in his address to the jury.

<sup>3</sup> Gr. Ev. § 17, as to first six lines.

evidence is received. Thus, for the purpose of determining the legal rights and liabilities of parties, the courts conclusively presume,—what, in a vast number of cases, must of course be contrary to the fact,<sup>1</sup>—that every sane person, above the age of fourteen, is acquainted with the criminal as well as the civil,<sup>2</sup> the common<sup>3</sup> as well as the statute,<sup>4</sup> law of the land; and the maxim "*ignorantia juris, quod quisque tenetur scire, neminem excusat*," is uniformly recognised in this country, as it formerly was in ancient Rome.<sup>5</sup> Indeed, this doctrine has been carried so far as to include the case of a foreigner, who was here charged with a crime, which was no offence in his own country.<sup>6</sup> In like manner,<sup>7</sup> a sane man of the age of discretion is conclusively presumed to contemplate the natural and probable *consequences* of his own acts; and therefore the intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon.<sup>8</sup> So, on an indictment for cutting with intent to

<sup>1</sup> See *Martindale v. Falkner*, 2 Com. B. 719, 720, per Maule, J.

<sup>2</sup> *Bilbie v. Lumley*, 2 East, 469, 472, per Ld. Ellenborough.

<sup>3</sup> A mistake of the legal effect of a document cannot be set up as a defence; *Powell v. Smith*, 41 L. J., Ch. 734, per Ld. Romilly.

<sup>4</sup> See *Stokes v. Salomons*, 9 Hare, 79, per Turner, V.-C.; *The Charlotta*, 1 Dods. Adm. 392, per Sir W. Scott; *Middleton v. Croft*, Str. 1056, per Ld. Hardwicke.

<sup>5</sup> 1 Russ. C. & M. 25; 1 Hale, 42; Ff. 22, 6, 9.

<sup>6</sup> *R. v. Esop*, 7 C. & P. 456, per Bosanquet & Vaughan, Js.; *Barronet's case*, 1 E. & B. 1; *Pearce & D.* 51, S. C.

<sup>7</sup> Gr. Ev. § 18, as to four following lines.

<sup>8</sup> 1 Russ. C. & M. 515—518; *R. v. Dixon*, 3 M. & Sel. 15. But if death does not ensue till a year and a day, that is, a full year, after the stroke, it is conclusively presumed that the stroke was not the sole cause of the death, and it is not murder. 4 Bl. Com. 197; Glassf. Ev. 592. The doctrine of presumptive evidence was familiar to the Mosaic Code; even to the letter of the principle stated in the text. Thus, it is laid down in regard to the manslayer, that "if he smite him with an *instrument of iron*, so that he die,"—or, "if he smite him with throwing a *stone wherewith* he may die, and he die,"—or, "if he smite him with a *hand weapon of wood wherewith* he may die, and he die; he is a murderer." See Numb. xxxv. 16, 17, 18. Here, every instrument of iron is conclusively taken to be a deadly weapon; and the use of any such weapon raises a conclusive presumption of malice. The same presumption arose from *lying in ambush*, and thence destroying another.—Id. v. 20. But, in other cases, the existence of malice was to be proved, as one of the facts in the case; and in the absence of express malice, the offence was reduced to the degree of manslaughter, as at the common law.—Id. v. 21, 22, 23. This very reasonable distinction seems to have been unknown to the Gentoo Code, which demands life for life, in all cases, except where the culprit is a Brahmin. "If

do the prosecutor some grievous bodily harm,<sup>1</sup> the judges have held that the prisoner was rightly convicted, though it appeared that his real intent was to wound another person;<sup>2</sup> and an intent to defraud a particular party will be conclusively presumed on an indictment for forgery, provided the defrauding of such party would be the natural result of the prisoner's act, if successful.<sup>3</sup> The law, in such a case, will not relax the rule, even though it should be proved that the prisoner did not entertain the intention charged.<sup>4</sup> In like manner, on a charge of arson for setting fire to a mill, an intent to injure or defraud the mill-owners will be conclusively inferred from the wilful act of firing.<sup>5</sup> The same doctrine should, it seems, on principle, apply to all other crimes.<sup>6</sup>

§ 81. Several decisions, however, are opposed to the general § 69 adoption of this rule, and tend to show that, in respect of those statutory offences, the character of which varies according to the intent with which they are perpetrated, the *real* intention of the prisoner must be left to the jury to be inferred from the facts proved. Thus, on an indictment for cutting,<sup>7</sup> where the intent laid in the several counts was to murder, to disable, and to do grievous bodily harm, but the intent found by the jury was to prevent being apprehended, the judges held that a conviction could not be sustained, though the prisoner had inflicted a serious wound.<sup>8</sup> So, where a party was charged with inflicting

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a man deprives another of life, the magistrate shall deprive that person of life." —Halhed's *Gentoo Laws*, b. xvi. § 1, p. 233.

<sup>1</sup> Under the repealed Act of 43 G. 3, c. 58.

<sup>2</sup> *R. v. Hunt*, 1 Moo. C. C. 93; *R. v. Fretwell*, 1 L. & Cave, 443; 9 Cox, 471, S. C. See, also, *R. v. Smith, Pearce & D.* 559, 7 Cox, 5 S. C.; which was an indictment under the repealed Act, 7 W. 4 & 1 V., c. 85, § 3.

<sup>3</sup> *R. v. Beard*, 8 C. & P. 148, per Coleridge, J.; *R. v. Hill*, id. 276, by all the judges; *R. v. Cooke*, id. 582.

<sup>4</sup> *R. v. Sheppard*, R. & R. 169; *R. v. Mazagora*, id. 291; *R. v. Geach*, 9 C. & P. 499. The prisoner may also be convicted on a count charging the real intent, *R. v. Hanson*, C. & Marsh. 334, by all the judges.

<sup>5</sup> *R. v. Farrington*, R. & R. 207; *R. v. Philp*, 1 Moo. C. C. 263.

<sup>6</sup> See *R. v. Murphy*, 13 Cox, 298.

<sup>7</sup> Under the repealed Act of 43 G. 3, c. 58.

<sup>8</sup> *R. v. Duffin*, R. & R. 365. This case is badly reported, and perhaps the decision turned upon the ground that the attempted apprehension was not lawful.

an injury dangerous to life with intent to murder, Mr. Justice Patteson held, in one case,<sup>1</sup> that the jury must be satisfied that the prisoner, at the time he committed the assault, had formed a deliberate intention of murdering his victim; but, in a subsequent case,<sup>2</sup> the same learned judge observed, that the jury *might* infer such intent from the circumstance that, had death ensued, the crime would have amounted to murder. Again, on an indictment under the Act of 9 G. 4, c. 31,<sup>3</sup> charging the prisoner with shooting at the prosecutor with intent to murder him, Mr. Justice Littledale allowed the jury to pronounce a verdict in accordance with the actual intent, which was to kill another person, and the prisoner was consequently acquitted.<sup>4</sup> The principle of this decision has also been recognised by Barons Parke and Alderson, in a case where the prisoner was charged, under 7 W. 4 & 1 V., c. 85, § 2,<sup>5</sup> with causing poison to be taken by the prosecutor with intent to murder him, and it appeared that the prisoner's real intention was to poison another party

§ 82. Notwithstanding these decisions, and the high reputation of the judges by whom they were pronounced, it is submitted that the distinction which they intend to establish is founded on no sound principle, but goes far towards frittering away one of the most valuable presumptions known to the criminal law. It must also be borne in mind, that other judges of great experience in the administration of criminal justice have refused to recognise this distinction.<sup>7</sup> But whether in these statutory offences the actual intent is to be found by the jury, or the implied intent is to be presumed by the law, it is agreed on all hands to be

<sup>1</sup> R. v. Cruse, 8 C. & P. 545.

<sup>2</sup> R. v. Jones, 9 C. & P. 260.

<sup>3</sup> Repealed by 24 & 25 V., c. 95, and other provisions enacted in 24 & 25 V., c. 100.

<sup>4</sup> R. v. Holt, 7 C. & P. 518. The learned judge observed, in summing up, "If this had been a case of murder, and the prisoner intending to murder one person, had, by mistake, murdered another, he would be equally liable to be found guilty. The question, however, may be different on the construction of this Act of Parliament."

<sup>5</sup> Repealed by 24 & 25 V., c. 95, and other provisions enacted in 24 & 25 V., c. 100.

<sup>6</sup> R. v. Ryan, 2 M. & Rob. 213.

<sup>7</sup> R. v. Lewis, 6 C. & P. 161, per Gurney, B.; R. v. Jarvis, 2 M. & Rob. 40, per id.; ante, p. 104, notes 2-5.

immaterial, whether the intent charged be the principle or subordinate motive which instigated the commission of the crime. Thus, where the jury found that the prisoner had wounded the prosecutor with the view of preventing his lawful apprehension, but that, *in order to effect that purpose*, he intended to do him some grievous bodily harm, the judges held that the conviction was right on a count charging the latter offence.<sup>1</sup> The same rule has been recognised where the immediate object of the criminal was to rob the party he wounded, and the wound was inflicted as the means of affecting the robbery.<sup>2</sup>

§ 83. The presumption that a party intends the natural consequences of his acts, is not confined to criminal matters, but extends equally to his civil responsibilities. Thus, the deliberate publication of calumny, which the publisher knows to be false, or has no reason to believe to be true, raises, in an action for libel,<sup>3</sup> a conclusive presumption of malice.<sup>4</sup> So, if a party makes a representation, which he knows to be false, and injury ensues to another, the law, whatever his real motives may have been, will infer that he has been actuated by a fraudulent or malicious intent.<sup>5</sup> So, the wilful neglect of a defendant to plead within the time appointed by law, is taken conclusively against him, as a confession of the plaintiff's right of action.<sup>6</sup> So, if a person, in the language of the Bankruptcy Act, "unable to pay his debts as they become due from his own money," spontaneously makes a transfer or payment in favour of any creditor, which necessarily has the effect of

<sup>1</sup> R. v. Gillow, 1 Moo. C. C. 85.

<sup>2</sup> R. v. Bowen, C. & Marsh. 149, per Coleridge, J.

<sup>3</sup> See 6 & 7 V., c. 96, § 6.

<sup>4</sup> Haire v. Wilson, 9 B. & C. 643; R. v. Shipley, 4 Doug. 73, 177, per Ashurst, J.; Fisher v. Clement, 10 B. & C. 475, per Ld. Tenterden; Baylis v. Lawrence, 11 A. & E. 925, per Patteson, J.; Rodwell v. Osgood, 3 Pick. 379.

<sup>5</sup> Tapp v. Lee, 3 B. & P. 371; Foster v. Charles, 6 Bing. 396; 7 Bing. 105; 4 M. & P. 61, 741, S. C.; Pontifex v. Bignold, 3 M. & Gr. 63.

<sup>6</sup> Rules of Sup. Ct., 1883, Ord. xxvii., r. 2, et seq. The principle of this Order evidently belongs to general jurisprudence. So in the Roman law; "Contumacia eorum, qui jus dicenti non obtemperant, litis damno coercetur." Dig. lib. 42, t. 1, l. 53. "Si citatus aliquis non compareat, habetur pro consentione." 3 Masc. de Prob. p. 253, concl. 1159, n. 26.

defeating or delaying his other creditors, the law conclusively presumes that he made it with that intent; and, provided that he afterwards is adjudged bankrupt on a bankruptcy petition presented within three months from the date of such act, the transfer or payment will, by the policy of the bankrupt law, be set aside as fraudulent, though all fraud in fact may be distinctly negatived.<sup>1</sup>

§ 84. Conclusive presumptions are also made in favour of judicial proceedings. Thus, it is an undoubted rule of pleading, that nothing shall be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged; and, consequently, the records in the Courts of Counties Palatine, they being superior courts, need not state the cause of action to have arisen within the jurisdiction.<sup>2</sup> In like manner it will be conclusively presumed in favour of all the proceedings of either House of Parliament, that, whenever the contrary does not plainly and expressly appear, the respective Houses have acted within their jurisdiction, and agreeably to the usages of Parliament, and the rules of law and justice; and, therefore, if a warrant be issued by the Speaker of the House of Commons at the instance of the House for the arrest of a witness, that document need not contain any recital of the grounds on which it was founded.<sup>3</sup> So, also, it is presumed, with respect to such writs as are actually issued by any Division of the High Court of Justice, that they are duly issued, and in a case in which the court has jurisdiction, unless the contrary appears on the face of them; and all such writs will of themselves, and without any further allegation, protect all officers and others in their aid acting under them: and this too, although

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<sup>1</sup> 46 & 47 V., c. 52, § 48; and 35 & 36 V., c. 58, § 53, Ir. See *Ex parte Craven*, 39 L. J., Bkpcy. 33; 10 Law Rep., Eq. 648, S. C.; In re *Craven*, *Ex parte Tempest*, 40 L. J. Bkpcy. 22; *Brown v. Kempton*, 19 L. J., C. P. 169; In re *Cheesebrough*, 12 Law Rep., Bq. 358; 40 L. J., Bkpcy. 79, S. C.; *Smith v. Cannan*, 2 E. & B. 35; In re *Wood*, 7 Law Rep., Ch. Ap. 302; *Ex parte Bailey*, in re *Barrell*, 22 L. J., Bkpcy. 45; *Bittlestone v. Cooke*, 6 E. & B. 296; *Bell v. Simpson*, 26 L. J., Ex. 363; *Bills v. Smith*, 6 B. & S. 314. See, also, as to the avoidance of voluntary settlements, 46 & 47 V., c. 52, § 47; and 35 & 36 V., c. 58, § 52, Ir.

<sup>2</sup> *Peacock v. Bell*, 1 Wms. Saund. 74, recognised in *Gosset v. Howard*, 10 Q. B. 453.

<sup>3</sup> *Gosset v. Howard*, 10 Q. B. 411, 455—459.

they be on the face of them irregular, or even void in form.<sup>1</sup> The respect due to the High Court, and the credit deservedly given to it, that it will not abuse its powers, or issue process except in due course, and in accordance with the authority entrusted to it by the law, furnish alike the reason and the justification for this somewhat arbitrary presumption.<sup>2</sup>

§ 85.<sup>3</sup> Again the courts are bound to assume, at least *prima facie*, that the unreversed sentence of a foreign or colonial court of competent jurisdiction is correct; for otherwise, they would, in effect, be constituting themselves courts of appeal, without power to reverse the judgment.<sup>4</sup> Judicial acts are also, as a general rule, conclusively presumed to have taken place at the earliest period of the day on which they were done. A judgment, therefore, would be treated as regular, though it were signed several hours after the defendant had died.<sup>5</sup> Still, as the doctrine rests on a mere fiction of law, it will not be recognised so as to work injustice in any particular case.<sup>6</sup> Neither will it apply to the issuing of a writ of summons, for if so, a plaintiff could not commence legal proceedings till the day after the cause of action had accrued, and the defendant in the meanwhile might escape out of the jurisdiction.<sup>7</sup> The *records* also of a court of justice, and indeed all records, are always presumed to have been correctly made.<sup>8</sup> No evidence, therefore, will be admissible to show that a charter granted by the Crown was made or delivered at another time than when it bears date;<sup>9</sup> and the day

<sup>1</sup> *Gosset v. Howard*, 10 Q. B. 453, 454, citing *Countess of Rutland's case*, 6 Rep. 54 a; and *Parsons v. Loyd*, 3 Wils. 341.

<sup>2</sup> *Id.*, 456, 467. The elaborate judgment of the Ex. Ch., as pronounced by Parke, B., in this case, deserves close study.

<sup>3</sup> Gr. Ev. § 12, as to one or two lines.

<sup>4</sup> *Brenan's case*, 10 Q. B. 492, 502, per Ld. Denman; *Robertson v. Struth*, 5 Q. B. 942, per Patteson, J.

<sup>5</sup> *Wright v. Mills*, 4 H. & N. 488; *Edwards v. R.*, 9 Ex. R. 628.

<sup>6</sup> *Clarke v. Bradlaugh*, L. R., 7 Q. B. D. 151; 50 L. J., Q. B. 678, S. C.

<sup>7</sup> *Id.*

<sup>8</sup> *Reed v. Jackson*, 1 East, 355; *Ramsbottom v. Buckhurst*, 2 M. & Sel. 567, per Ld. Ellenborough; 1 Inst. 260; *R. v. Carlile*, 2 B. & Ad. 367—369, per Ld. Tenterden. "*Res judicata pro veritate accipitur.*" Dig. lib. 50, t. 17, l. 207.

<sup>9</sup> *Ladford v. Gretton*, Plowd. 490.



specified in a record of conviction will be conclusive proof of the commission day of the assizes at which the trial took place.<sup>1</sup> In this last case, however, the party against whom the record is produced, may still show, if necessary, by parol evidence the actual day of the trial; because, although by fiction of law the whole time of the assizes is considered as one day, the court will judicially notice that this legal day may consist of many natural days, and will not permit justice to be defeated by a mere arbitrary rule.<sup>2</sup> Proof of the real day of trial would not, in such a case, contradict the record, but would simply explain it. So if a *Nisi Prius* record were to contain two counts, or distinct causes of action, and a verdict awarding damages to the plaintiff were entered generally, parol evidence would be admissible to show that the substantial damages were recovered on one count only.<sup>3</sup> After verdict, whether in a civil or a criminal case,<sup>4</sup> it will be presumed that those facts, without proof of which the verdict could not have been found, were proved, though they are not distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in reasonable intendment.<sup>5</sup> In other words, the verdict will cure any defective statement, though it will not cure the omission of any material averment.<sup>6</sup> So, the notes taken by the judge at *Nisi Prius* are presumed to be correct, and no party is allowed to raise before the Court in Banc any question respecting the rejection of evidence at the trial, unless it appears from these notes that the evidence was formally tendered.<sup>7</sup>

<sup>1</sup> See *Thomas v. Ansley*, 6 Esp. 80; *R. v. Page*, id. 83.

<sup>2</sup> *Whitaker v. Wisbey*, 21 L. J., C. P. 116; 12 Com. B. 44, S. C.; *Roe v. Hersey*, 3 Wils. 274.

<sup>3</sup> *Preston v. Peeke*, 27 L. J., Q. B. 424; 1 E. B. & E. 336, S. C.

<sup>4</sup> *R. v. Waters*, 1 Den. 356; 2 C. & Kir. 868, S. C.; *R. v. Bowen*, 13 Q. B. 790; *Heymann v. R.*, 8 Law Rep., Q. B. 102; 12 Cox, 383, S. C.; *R. v. Goldsmith*, 12 Cox, 479; *R. v. Aspinall*, 46 L. J., M. C. 145.

<sup>5</sup> *Jackson v. Peaked*, 1 M. & Sel. 237, per Ld. Ellenborough; *Steph. Pl.* 162—164; *Spieres v. Parker*, 1 T. R. 141; *Davis v. Black*, 1 Q. B. 911, 912, per Ld. Denman, C. J., and Patteson, J.; 1 G. & D. 432, S. C.; *Harris v. Goodwyn*, 2 M. & Gr. 405; 2 Scott, N. R. 459; 9 Dowl. 409, S. C.; *Goldthorpe v. Hardman*, 13 M. & W. 377. See, also, *Smith v. Keating*, 6 Com. B. 136; *Kidgill v. Moor*, 9 Com. B. 384; and Ld. Delamere v. The Queen, 2 Law Rep., H. L. 419; 36 L. J., Q. B. 313, in Dom. Proc., S. C.

<sup>6</sup> *Bradlaugh v. R.*, L. R., 3 Q. B. D. 607, 622, 625, 634, 637, 642, per Ct. of App.; 48 L. J., M. C. 5, S. C. nom. *R. v. Bradlaugh*; and 14 Cox, 68.

<sup>7</sup> *Gibbs v. Pike*, 9 M. & W. 351, 360, 361, per Ld. Abinger, and Alderson, B.; 1 Dowl. N. S. 409, S. C.

§ 86. The solemnity of an act done, though not done in court, will also sometimes raise a conclusive presumption in its favour. Thus, where an award professes to be made *de præmissis*, the presumption is that the arbitrator intended to dispose finally of all the matters in difference; and his award will be held final, if by any intendment it can be made so.<sup>1</sup> A bond, or other specialty, is also presumed to have been made upon good consideration, so long as the instrument remains unimpeached.<sup>2</sup> By virtue, too, of a statute of the present reign,<sup>3</sup> "every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person *signing the same*,"<sup>4</sup> notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact taken on board; provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims." Again, every conveyance made under the Act for facilitating the sale and transfer of land in Ireland, is, by that statute rendered "for all purposes conclusive evidence" that all previous proceedings leading to such conveyance have been regularly taken;<sup>5</sup> and every declaration of title by the Landed Estates Court is as conclusive upon the rights of all parties as any such deed of conveyance.<sup>6</sup>

§ 86A. Many contracts are now made by one party delivering to the other a document in a common form containing the proposed

<sup>1</sup> *Harrison v. Creswick*, 13 Com. B. 399, 416; *Jewell v. Christie*, 36 L. J., C. P. 168; 2 Law Rep., C. P. 296, S. C.

<sup>2</sup> *Lowe v. Peers*, 4 Burr. 2225; 3 St. Ev. 930; *Story, Bills*, § 16. See post, § 148.

<sup>3</sup> 18 & 19 V., c. 111, § 3.

<sup>4</sup> See *Meyer v. Dresser*, 16 Com. B., N. S. 646; 33 L. J., C. P. 289, S. C.; *Jessel v. Bath*, 36 L. J., Ex. 149; 2 Law Rep., Ex. 267, S. C.

<sup>5</sup> 21 & 22 V., c. 72, § 85, Ir. See *Power v. Reeves*, 10 H. of L. Cas. 645; *In re Tottenham's estate*, 3 Law Rep., Eq. 528.

<sup>6</sup> 21 & 22 V., c. 72, § 51, Ir.; *Billing v. Welch*, I. R., 6 C. L. 88.

terms. This form constitutes the offer of the party tendering it. If the form is accepted without objection, the acceptor is presumed to have agreed to the terms, and, as a general rule, is bound by the contents, and this too whether he has or not in fact read the document.<sup>1</sup> Some exceptions, it is true, have been engrafted on this rule, 1st, where from the nature of the transaction the person accepting the document may reasonably suppose that it contains no special terms; 2nd, where the terms are printed in a mode calculated to mislead; and 3rd, where the terms or conditions are in themselves unreasonable or irrelevant.<sup>2</sup>

§ 87.<sup>3</sup> The law also recognises a conclusive presumption in § 74 favour of the due execution of *ancient deeds and wills*. When these instruments are thirty years old, and are unblemished by any alterations, they are said to prove themselves; their bare production is sufficient; the subscribing witnesses being presumed to be dead. This presumption,—so far as the present rule of evidence is concerned,—is not affected by proof that the witnesses are living,<sup>4</sup> and it seems, even actually in court;<sup>5</sup> nor, in the case of wills, by showing that the testator died within the thirty years.<sup>6</sup> But it must appear that the instrument comes from such custody, as, though not strictly proper in point of law, is sufficient to afford a reasonable presumption in favour of its genuineness;<sup>7</sup> and that it is otherwise free from just ground of suspicion.<sup>8</sup> Whether, if the deed be a conveyance of real estate, the party is bound first to show some acts of possession under it, is a point not perfectly clear upon the authorities; but the weight

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<sup>1</sup> *Watkins v. Wymill*, L. R., 10 Q. B. D. 178; 52 L. J., Q. B. 121, S. C., and cases there cited.

<sup>2</sup> *Id.*

<sup>3</sup> Gr. Ev. § 21, in great part.

<sup>4</sup> *Doe v. Burdett*, 4 A. & E. 19.

<sup>5</sup> Per Yates, J., as cited by Ld. Kenyon in *Marsh v. Collnett*, 2 Esp. 666.

<sup>6</sup> *Doe v. Wolley*, 8 B. & C. 22; 3 C. & P. 702, S. C. In *Jackson v. Blanshan*, 3 Johns. 292, it was held by the Sup. Ct. of New York that the thirty years must be computed from the time of the testator's death.

<sup>7</sup> *Doe v. Samples*, 8 A. & E. 151; Bp. of Meath. v. M. of Winchester, 3 Bing. N. C. 200, 201, per Tindal, C. J., representing all the judges in Dom. Proc.; 10 Bligh, 462—464, S. C.

<sup>8</sup> *Roe v. Rawlings*, 7 East, 291.

of opinion seems to be in the negative, as will hereafter be more fully explained.<sup>1</sup> It is also questionable whether the rule applies to an instrument bearing the seal of a court or a corporation; "because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for after such a lapse of time, yet the seals of courts and corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed."<sup>2</sup>

§ 88. This rule is not confined to deeds and wills, but extends equally to *letters*,<sup>3</sup> *entries*,<sup>4</sup> *receipts*,<sup>5</sup> *settlement certificates*,<sup>6</sup> and indeed to all other written documents, and provided that these purport to be thirty years old, and come from the proper custody, the signatures and handwriting need not be proved. In *Wynne v. Tyrwhitt* the court observed, that the rule was founded "on the great difficulty, nay, impossibility, of proving the handwriting of the party after such a lapse of time."<sup>7</sup> § 75

§ 89.<sup>8</sup> *Estoppels* may be ranked in this class of presumptions.<sup>9</sup> A man is estopped, when he has done or permitted some act, which the law will not allow him to gainsay. "The law of estoppel is not so unjust or absurd, as it has been too much the custom to represent."<sup>10</sup> Its foundation rests partly on the obligation to speak and act in accordance with truth, by which every honest man is bound, and partly on the policy of the law, which thus seeks to prevent the mischiefs that would inevitably result from uncertainty, con- § 76

<sup>1</sup> See *Malcolmson v. O'Dea*, 10 H. of L. Cas. 593, & 614—616; cited post, §§ 665, 666.

<sup>2</sup> Per *Ld. Tenterden*, C. J., in *R. v. Bathwick*, 2 B. & Ad. 648.

<sup>3</sup> *Doe v. Beynon*, 12 A. & E. 431; 4 P. & D. 193, S. C., recognising *Bere v. Ward*, 2 Ph. Ev. 204.

<sup>4</sup> *Wynne v. Tyrwhitt*, 4 B. & A. 376.

<sup>5</sup> *Bertie v. Beaumont*, 2 Price, 308.

<sup>6</sup> *R. v. Ryton*, 5 T. R. 259; *R. v. Netherthong*, 2 M. & Sel. 337. In these cases no proof of the custody was given in evidence, but the court held this to be immaterial.

<sup>7</sup> 4 B. & A. 377.

<sup>8</sup> Gr. Ev. § 22, in part.

<sup>9</sup> By the N. York Civ. Code, § 1792, estoppels are abolished.

<sup>10</sup> Per *Taunton, J.*, 2 A. & E. 291.

fusion, and want of confidence, were men permitted to deny what they had deliberately asserted and received as true. The doctrine of estoppels has, however, been guarded with great strictness; not because the party enforcing it is presumed to be desirous of excluding the truth;—for the more reasonable supposition is that that is true, which the opposite party has already solemnly admitted;—but because the estoppel *may* exclude the truth. Hence estoppel must be certain to every intent; for no one shall be prevented from setting up the truth, unless it be in plain contradiction to his former allegations and acts.<sup>1</sup>

§ 90. These last words extend, not only to a man's own allegations and acts, but also to those of *all persons through whom he claims*;<sup>2</sup> or, to express the same sentiment in the technical language of the law, *estoppels* are usually *binding upon parties and privies*.<sup>3</sup> Lord Coke has divided privies into three classes; first, privies in blood, as heirs; secondly, privies by estate, as feoffees, lessees, assignees, &c.; and thirdly, privies in law, “as the lord by escheat, the tenant by the courtesy, the tenant in dower, the incumbent of a benefice,”<sup>4</sup> husbands suing or defending in right of their wives,<sup>5</sup> executors and administrators.<sup>6</sup> In all these and like cases, the law,—acting upon the wise principle, *qui sentit commodum, sentire debet et onus*,—provides, that the privy shall stand in no better position than the party through whom he derives his title: but that, if the latter is not at liberty to contradict what he has formerly said or done, the former shall be subject to a like disability.<sup>7</sup> One exception, however, to this rule is admitted in favour of those privies, who would themselves be aggrieved or defrauded by the conduct of the party through whom they claim. For instance, where a man executed a deed with the fraudulent intent of defeating the statutes of mortmain, the court

<sup>1</sup> *Bowman v. Taylor*, 4 N. & M. 264, and 2 A. & E. 278, 289, per *Ld. Denman*; *Id.* 291, per *Taunton, J.*; *Lainson v. Tremere*, 1 A. & E. 792; 3 N. & M. 603, S. C.; *Kepp v. Wiggett*, 10 Com. B. 53, per *Williams, J.*; *Pelletreau v. Jackson*, 11 Wend. 117; 4 Kent, Com. 261, n.; *Carver v. Jackson*, 4 Pet. 83. <sup>2</sup> B. N. P. 233.

<sup>3</sup> See post, §§ 787—793, as to admissions by privies.

<sup>4</sup> Co. Lit. 352 a.

<sup>5</sup> *Outram v. Morewood*, 3 East, 346.

<sup>6</sup> *R. v. Hebden*, And. 389.

<sup>7</sup> *Taylor v. Needham*, 2 Taunt. 278.

held that his heir-at-law was not estopped from questioning the validity of the indenture, since his claim to the lands was founded, not on the deed, but on his title by descent.<sup>1</sup>

§ 91. Estoppels are usually divided into three classes; namely, those by matter of record, those by deed, and those in pais.<sup>2</sup> The first class will be more conveniently treated, when the admissibility and effect of Judgments,<sup>3</sup> which are the most extensive species of records, come to be discussed; but it may be here observed, that neither a judgment inter partes, nor a deed, will operate *conclusively* as an estoppel, unless the matter of estoppel appears on the record,<sup>4</sup> and is met by the pleading which is now substituted for the old demurrer,<sup>5</sup> nor unless it has been *expressly pleaded* by way of estoppel, at least where an opportunity of so pleading it has been afforded.<sup>6</sup> If a party, having such an opportunity, does not avail himself of it, the court will conclusively presume that he has intended to waive all benefit derivable from the estoppel, and will leave the jury to form their own conclusions from the facts presented to them in evidence.<sup>7</sup> If, indeed, no opportunity has arisen for pleading the matter of estoppel in bar, it would seem on principle that an estoppel by record or by deed ought to be binding when offered in evidence;

<sup>1</sup> Doe v. Lloyd, 5 Bing. N. C. 741. See Smyth v. Wilson, 2 Jebb & Sy. 660.

<sup>2</sup> Co. Lit. 352 a: 2 Smith, L. C. 657.

<sup>3</sup> See post, § 1667, et seq.

<sup>4</sup> See Robinson v. Robinson, L. R. 2 P. D. 75.

<sup>5</sup> Rules of Sup. Ct., 1883, Ord. xxv., rr. 1, 2; Bradley v. Beckett, 7 M. & Gr. 994.

<sup>6</sup> 2 Smith, L. C. 670, 674 & 683. The whole of Mr. Smith's note, from p. 656 to 726, should be carefully perused. It contains an elaborate exposition of a very difficult branch of the law. See also Trevivan v. Lawrence, 1 Salk. 276; 2 Smith, L. C. 654, S. C.; Magrath v. Hardy, 4 Bing. N. C. 782.

<sup>7</sup> Outram v. Morewood, 3 East, 346, 365; Vooght v. Winch, 2 B. & A. 662; Doe v. Huddart, 2 C. M. & R. 316; 5 Tyr. 846, S. C.; Doe v. Seaton, 2 C. M. & R. 732, Parke, B.; Nowlan v. Gibson, 12 Ir. Law R. 5, 8—12; Matthew v. Osborne, 13 Com. B. 919; Doe v. Wright, 10 A. & E. 763; 1 P. & D. 673, S. C.; Magrath v. Hardy, 4 Bing. N. C. 782; 6 Scott, 627; S. C., as to estoppels by matter of record:—Wilson v. Butler, 4 Bing. N. C. 748; Bowman v. Rostron, 2 A. & E. 295; 4 N. & M. 452, S. C.; Young v. Raincock, 7 Com. B. 310; Carpenter v. Buller, 8 M. & W. 212; Potts v. Nixon, 5 I. R., C. L. 45, as to estoppel by deed:—and Freeman v. Cooke, per Parke, B., 2 Ex. R. 662; 6 Dowl. & L. 189, S. C., as to both kinds of estoppel.

and such is the actual rule in some of the United States,<sup>1</sup> though in this country the point has not yet been expressly decided.<sup>2</sup>

§ 92. With respect, also, to estoppels *in pais*, no doubt can be § 79 entertained, but that they, in general, need not be pleaded in order to make them obligatory; as, for instance, if a man were to represent another as his agent, in order to procure a person to contract with him as such, and this person were so to contract, the contract would bind the principal equally with one made by himself, and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract.<sup>3</sup> So, if an indorsee were to sue an acceptor on a bill payable to the order of the drawer, and the defendant were to plead that the drawer had no authority to indorse, the plaintiff, though he might reply the estoppel,<sup>4</sup> would not be forced to do so, but he might by his pleading raise the point of law, that the statement of defence disclosed no legal answer to the action.<sup>5</sup>

§ 93. It seems now clearly settled that a party is not estopped by § 80 his deed from avoiding it by proving that it was executed for a fraudulent, illegal, or immoral purpose. In one case,<sup>6</sup> indeed, where a man, in order to give his brother a colourable qualification to kill game, had conveyed some lands to him, the court held that the grantor's widow could not avoid this conveyance in an action of ejectment brought against her by the brother; and, in the subsequent case of *Prole v. Wiggins*, Sir Nicholas Tindal observed that this decision rested on the fact that "the defence set up was *inconsistent* with the deed."<sup>7</sup> The case, however, can scarcely be supported by this circumstance, for in an action of ejectment by the grantee of an annuity, to recover premises on which it was secured, the grantor was allowed to show that the premises were of less value than the

<sup>1</sup> See *Howard v. Mitchell*, 14 Mass. 241; *Adams v. Barnes*, 17 Mass. 365.

<sup>2</sup> *R. v. Blakemore*, 2 Den. 410. See *R. v. Houghton*, 1 E. & B. 512; *Ld. Feversham v. Emerson*, 11 Ex. R. 385; and *R. v. Hutchins*, L. R. 5 Q. B. D. 353; 49 L. J., M. C. 64, S. C. This last case was reversed on another point by the Court of App. L. R. 6 Q. B. D. 300; 50 L. J., M. C. 35, S. C.

<sup>3</sup> *Freeman v. Cooke*, 2 Ex. R. 662; 5 Dowl. & L. 189, S. C., per Parke, B.

<sup>4</sup> *Sanderson v. Collman*, 4 M. & Gr. 209.

<sup>5</sup> *Hallifax v. Lyle*, 3 Ex. R. 446; 6 Dowl. & L. 424, S. C.

<sup>6</sup> *Doe v. Roberts*, 2 B. & A. 367. See also *Phillpotts v. Phillpotts*, 10 Com. B. 85.

<sup>7</sup> 3 Bing. N. C. 235.

annuity, and, consequently, that the deed required enrolment, although he had expressly covenanted in the deed that the premises were of greater value.<sup>1</sup> So, also, where a bond has been given, or a covenant made, for an illegal consideration, the obligor or covenantor is not debarred from avoiding the instrument by pleading and proving the illegality;<sup>2</sup> and this too, though a legal, but untrue, consideration is stated on the face of the deed.<sup>3</sup> Indeed, the better opinion seems to be, that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which render the instrument void ab initio;<sup>4</sup> for although a party will thus, in certain cases, be enabled to take advantage of his own wrong,<sup>5</sup> yet this evil is of a trifling nature in comparison with the flagrant evasion of the law, that would result from the adoption of an opposite rule.<sup>6</sup> It seems scarcely necessary to add that a party is not estopped by his deed, if he executed it while, from duress, infancy, or other cause, he was incapable of making a

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<sup>1</sup> *Doe v. Ford*, 3 A. & E. 649. In this case a question was raised whether a covenant, under any circumstances, is such a declaration as to estop a party from afterwards disputing the fact covenanted for, but the point was left undecided. In America a party may, in some cases, be estopped by a covenant. Thus a covenant of warranty estops the grantor from setting up an after-acquired title against the grantee, for it is a perpetually operating covenant; *Terrett v. Taylor*, 9 Cranch, 43; *Jackson v. Matsdorf*, 11 Johns. 97; *Jackson v. Wright*, 14 Johns. 193; *M'Williams v. Nisby*, 2 Serg. & R. 515; *Somes v. Skinner*, 3 Pick. 52; but he is not estopped by a covenant, that he is seised in fee and has good right to convey; *Allen v. Sayward*, 5 Greenl. 227; for any seisin in fact, though by wrong, is sufficient to satisfy this covenant, its import being merely this, that he has the seisin in fact, at the time of conveyance, and thereby is qualified to transfer the estate to the grantee.

<sup>2</sup> *Prole v. Wiggins*, 3 Bing. N. C. 230; 3 Scott, 607, S. C.; *Collins v. Blantern*, 2 Wils. 341; 1 Smith, L. C. 310, S. C.; *Gas Light & Coke Co. v. Turner*, 5 Bing. N. C. 666; *affd.* in Ex. Ch., 6 Bing. N. C. 324; *Stratford & Moreton R. Co. v. Stratton*, 2 B. & Ad. 518; *Hill v. Manch. Waterw. Co.*, *id.* 552, 553; *Benyon v. Nettleford*, 3 M. & Gord. 94; *Horton v. Westm. Improve. Comrs.*, 7 Ex. R. 780.

<sup>3</sup> *Paxton v. Popham*, 9 East, 419.

<sup>4</sup> *Id.*

<sup>5</sup> *Doe v. Ford*, 3 A. & E. 654, *per* *Ld. Denman*; *Doe v. Howells*, 2 B. & Ad. 747.

<sup>6</sup> *Benyon v. Nettlefold*, 20 L. J., Ch. 186, 187; 3 M. & Gord. 102, S. C. See *Mallalieu v. Hodgson*, 16 Q. B. 689; *Bowes v. Foster*, 2 H. & N. 779; *Taylor v. Bowers*, 46 L. J., Q. B. 39.



valid contract, or if he was deceived by the fraudulent misrepresentations or acts of other parties.<sup>1</sup>

§ 94. At one time it was thought, that trustees acting for the benefit of the public would not be estopped from disputing the validity of their deeds, because, if they were, the innocent parties, on whose behalf they were acting, might be seriously injured.<sup>2</sup> This doctrine, however, is now distinctly confined to those cases in which the trustees for the public have, in their dealings with another party, violated a public statute, the contents of which are presumed to be known to such party. Therefore, where a bridge Act authorised commissioners to mortgage the tolls, and enacted that the mortgagees should have no preference by reason of priority, the court held that, in an action of ejectment brought by a mortgagee of the tolls against the commissioners, the defendants were estopped from setting up the fact of an earlier mortgage to defeat the legal estate of the lessor of the plaintiff. In this case, no presumption could be made as to the mortgagee's knowledge of the fact that a previous mortgage had been made; and the judges considered that there was no authority for holding, that trustee for a public purpose were in any peculiar state of protection on such a point.<sup>3</sup>

§ 95. Though an estoppel may bind a person acting in one capacity, it does not necessarily follow that it will have a similar effect, when such party is sustaining a totally different character.<sup>4</sup> Thus, where an executor de son tort verbally agreed with the landlord of the intestate to deliver up the premises demised, and afterwards took out letters of administration, he was held not concluded from bringing an action of ejectment against the landlord, who had

<sup>1</sup> *Hayne v. Maltby*, 3 T. R. 438.

<sup>2</sup> *Fairtile v. Gilbert*, 2 T. R. 169; *Doe v. Hares*, 4 B. & Ad. 440, per Littledale, J.

<sup>3</sup> *Doe v. Horne*, 3 Q. B. 757, 766, 767; *R. v. White*, 4 Q. B. 111, 112; *Horton v. Westm. Improv. Comrs.*, 7 Ex. R. 780.

<sup>4</sup> 2 *Smith*, L. C. 667; *Robinson's case*, 5 Rep. 32 b; *Com. Di. Estoppel*, C.; 2 *Co. Lit.* 365 b; *Smyth v. Wilson*, 2 *Jebb & Sy.* 660; *Leggott v. Gt. N. Ry. Co.*, L. R., 1 Q. B. D. 599; 45 L. J., Q. B. 557, S. C. See *Bennett v. Gamgee*, 46 L. J., Ex. 33; S. C. aff. on app. id. 204.

actually obtained possession under the agreement.<sup>1</sup> But if "an heir apparent, having only the hope of succession, conveys, during the life of his ancestor, an estate, which afterwards descends upon him, although nothing passes at that time, yet, when the inheritance descends upon him, he is estopped to say that he had no interest at the time of the grant."<sup>2</sup> The distinction between these two cases appears to be this, that in the former, the party not estopped was acting for the benefit of others; in the latter, the party estopped was *sui juris*.

§ 96. In regard to estoppels by deed, a party is not prevented ; 83 from disputing the correctness of that which is not an essential averment, but is *mere description*; such for instance, as the date of the deed; the quantity of land; its nature, whether arable or meadow; and the like; for these statements are but incidental and collateral to the principal matter, and may be supposed not to have received the deliberate attention of the parties.<sup>3</sup> It seems, however, that in this country, if a deed of conveyance distinctly states in the operative part that the consideration money has been received, and the estoppel is properly pleaded,<sup>4</sup> the fact of payment, and the amount paid, are conclusively presumed;<sup>5</sup> although a receipt indorsed upon the deed will not in itself amount to an estoppel.<sup>6</sup> In America,<sup>7</sup> though the party is estopped from denying the conveyance, and that it was for a valuable consideration, the weight of authority is in favour of treating the statement in the deed as only *prima facie*

<sup>1</sup> Doe v. Glenn, 1 A. & E. 49; 3 N. & M. 837, S. C. See, also, Middleton's case, 5 Rep. 21; Metters v. Brown, 32 L. J., Ex. 138; 1 H. & C. 686, S. C.; Lyons v. Mulderry, Hayes, R. 530; Kirwan v. Gorman, 9 Ir. Eq. R. 154; Johnson v. Warwick, 25 L. J., C. P. 102.

<sup>2</sup> Hayne v. Maltby, 3 T. R. 441, per Ld. Kenyon.

<sup>3</sup> Com. Di. Estoppel, A. 2; Yelv. 227, by Metcalfe, n. 1; Doddington's case, 2 Co. 33; Shipworth v. Green, 8 Mod. 311; 1 Str. 610, S. C.

<sup>4</sup> Potts v. Nixon, 1 R., 5 C. L. 45.

<sup>5</sup> Shelly v. Wright, Willes, 9; Cossens v. Cossens, id. 25; Rowntree v. Jacob, 2 Taunt. 141, in which last case there were highly suspicious circumstances tending to show that the consideration money had not in fact been paid; Baker v. Dewey, 1 B. & C. 704; Lampon v. Corke, 5 B. & A. 606; Hill v. Manch. Waterw. Co., 2 B. & Ad. 544. See Smith v. Battams, 26 L. J., Ex. 332; also Gresley v. Mousley, 3 De Gex, F. & J. 433.

<sup>6</sup> Lampon v. Corke, 5 B. & A. 611, per Holroyd, J., 612, per Best, J.; Straton v. Rastall, 2 T. R. 366.

<sup>7</sup> Gr. Ev. § 26, n., almost verbatim.

evidence of the amount paid, in an action of covenant by the grantee to recover back the consideration, or in an action by the grantor, to recover the price which is yet unpaid.<sup>1</sup>

§ 97. The question how far parties are bound by *recitals*<sup>2</sup> in *deeds* has of late years been much discussed; and the doctrine of Lord Coke, that "a recital doth not conclude, because it is no direct affirmation,"<sup>3</sup> has been expressly overruled. The law on this subject has been ably expounded by Baron Parke, in *Carpenter v. Buller*.<sup>4</sup> "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound<sup>5</sup> to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke Littleton, 352 b; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed, is found in the case of *Lainson v. Tremere*,<sup>6</sup> where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of 170*l.*, and the defendant was estopped from pleading that it was 140*l.* only, and that such amount had been paid. So, where other *particular* facts are mentioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond.<sup>7</sup> All

<sup>1</sup> The principal cases will be found referred to in the early editions of this Work.

<sup>2</sup> As to the effect of recitals in a deed which has been tendered for execution but not executed, see *Bulley v. Bulley*, 44 L. J., Ch. 79.

<sup>3</sup> Co. Lit. 352 b.

<sup>4</sup> 8 M. & W. 212. As to other cases where a recital has been held conclusive, see *Bowman v. Taylor*, 2 A. & E. 278; *Hills v. Laming*, 9 Ex. R. 256; *Lainson v. Tremere*, 1 A. & E. 792; 3 N. & M. 603, S. C.; *R. v. Stamper*, 1 Q. B. 123; *Hill v. Manch. Waterw. Co.*, 2 B. & Ad. 544; *Pargeter v. Harris*, 7 Q. B. 708. See, also, *Bayley v. Bradley*, 5 Com. B. 396; *Young v. Raincock*, 7 Com. B. 310; *Horton v. Westm. Improve. Comrs.*, 7 Ex. R. 780; and *Hungerford v. Beecher*, 5 Ir. Eq. R., N. S. 417. But see *Lindsay v. E. of Wicklow*, 1 R. 7 Eq. 192.

<sup>5</sup> Even though she be a married woman, *Semble* per Ld. J. James, in *Jones v. Frost*, in re *Fiddey*, 7 Law Rep., Ch. App. 773.

<sup>6</sup> 1 A. & E. 792; 3 N. & M. 603, S. C. See *Brooke v. Haymes*, 6 Law Rep., Eq. 25

<sup>7</sup> 1 Roll. Abr. 873, c. 25.

the instances given in Com. Dig., Estoppel, A. 2, under the head of 'Estoppel by Matter of Writing' (except one which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and *wholly collateral* to it,<sup>1</sup> to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of 170*l.* in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less could it be so held, if the matter alleged in the instrument were wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other proceeding between them."

§ 98. From this passage it would appear that, to make a recital operate as an estoppel, there must be, first, a distinct statement<sup>2</sup> of some material<sup>3</sup> particular<sup>4</sup> fact; secondly, a contract made with reference to such statement;<sup>5</sup> and, thirdly, either an action directly

<sup>1</sup> See *S.-East. Ry. Co. v. Warton*, 31 L. J., Ex. 515.

<sup>2</sup> See *Kepp v. Wiggett*, 10 Com. B. 35.

<sup>3</sup> In *Carpenter v. Buller*, 8 M. & W. 213, the court were strongly inclined to think that, in a deed relating to an adit, a recital that certain neighbouring lands, through which the adit did not pass, belonged to A. B., was an immaterial matter, which a party to the deed was not estopped from denying. The point, however, was not directly decided, as the admission was held inconclusive on other grounds.

<sup>4</sup> As to the distinction between generality and particularity, see Com. Dig., Estoppel, A. 2, and notes to *Rainsford v. Smyth, Dyer*, 196 a.

<sup>5</sup> In *Stronghill v. Buck*, 14 Q. B. 787, the court thus stated the law:—"Where a recital is intended to be a statement, which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing

founded on the instrument containing the recital, or one which is brought to enforce the rights arising out of such instrument.<sup>1</sup> In the event of these requisites being satisfied, it would further seem, that the doctrine may, in some cases, be extended to instruments not under seal. In all cases of estoppel by recital, the matter recited requires no proof; since the recital is not offered as secondary, but as primary evidence, which cannot be controverted, and which forms a muniment of title. This rule, however, only applies to so much of a deed as is *actually recited*; and therefore if it becomes necessary to rely on any other part of such deed, it must be produced and proved in the regular way.<sup>2</sup>

§ 99 Returning from the limited question of recitals to the general doctrine of estoppels, it is important to bear in mind this rule: that every estoppel must be *reciprocal*; that is, it must bind both parties, since a stranger can neither take advantage of an estoppel, nor be bound by it.<sup>3</sup> Thus, where a party, possessed of chambers in Lincoln's Inn, which he held as tenant-at-will under the benchers, recited in a deed, by which he conveyed his interest to A., that he was seised of these chambers for life, and subsequently surrendered them to the benchers, who admitted B. as tenant, the court held that B., in defending an action of ejectment brought against him by A., was not estopped from denying that the surrenderor was seised for life.<sup>4</sup> So, where a tenant took certain lands from the assignees of a bankrupt, by a deed in which they were described as freehold, he was held not estopped, as against the bankrupt's wife, who claimed dower, from proving that they were in fact leasehold.<sup>5</sup> So, a conviction on an indictment for obstructing a public highway cannot be pleaded as an estoppel, in an action brought by the party convicted against a

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the instrument." See, also, *Young v. Raincock*, 7 Com. B. 310; *Blackhall v. Gibson*, 2 L. R., Ir. 49.

<sup>1</sup> *Wiles v. Woodward*, 5 Ex. R. 557, 563; *Carter v. Carter*, 27 L. J., Ch. 74, 84, 85, per Wood, V.-C.; *Fraser v. Pendlebury*, 13 L. J., C. P. 1.

<sup>2</sup> *Gillett v. Abbott*, 7 A. & E. 783; 3 N. & P. 24, S. C.

<sup>3</sup> Co. Lit. 352 a.

<sup>4</sup> *Doe v. Errington*, 6 Bing. N. C. 79.

<sup>5</sup> *Gaunt v. Wainman*, 3 Bing. N. C. 69.

third person for using the way.<sup>1</sup> Again, the grantee, or lessee of a deed-poll, is not, in general, estopped from gainsaying anything mentioned in the deed; for it is the deed of the grantor or lessor only; yet if such grantee or lessee claim title under the deed, he is hereby estopped to deny the title of the grantor.<sup>2</sup> An exception to this rule requiring reciprocity in estoppels would perhaps be recognised in the case of deeds-poll, because in these instruments one party only is intended to be bound, and as he has executed a deed with the same solemnities as an indenture, no valid reason can be urged why the doctrine of estoppel should not apply to him.<sup>3</sup>

§ 100. A further rule with respect to estoppels by deed is this, § 87 that a deed which can take effect *by interest* shall not be construed to take effect by estoppel.<sup>4</sup> Thus, if a lessor has any interest in the demised premises, even though it be for a less period than he professes to grant, the lease shall not work by estoppel, but shall enure to the extent of the lessor's interest, and no further.<sup>5</sup> But if a person, having no title whatever, makes a lease by indenture, this will estop the parties to the deed from alleging the lessor's want of title during the continuance of the lease; and if the lessor subsequently purchases the land, or otherwise obtains an interest in it, the lease, which was originally a lease by *estoppel*, will be converted into a lease *in interest*, and the heir or assignee of the lessor will be bound thereby, as well as the lessee and his assignees.<sup>6</sup>

§ 101. The most ordinary instance of estoppel by *matter in pais*,<sup>7</sup> § 88 is the well-established rule, that a tenant, during his possession of

<sup>1</sup> *Petrie v. Nuttall*, 11 Ex. R. 569.

<sup>2</sup> Co. Lit. 363 *b*; *Goddard's case*, 4 Co. 44.

<sup>3</sup> 2 Smith, L. C. 660; Bac. Ab., tit. Leases, O.

<sup>4</sup> *Doe v. Barton*, 11 A. & E. 311, per Patteson, J.

<sup>5</sup> *Id.* in argument; Co. Lit. 45 *a*. 47 *b*; *Doe v. Seaton*, 2 C. M. & R. 730 per Parke, B.; *Walton v. Waterhouse*, 3 Wms. Saund. 417 *a*, et seq.

<sup>6</sup> *Webb v. Austin*, 7 M. & Gr. 701; *Sturgeon v. Wingfield*, 15 M. & W. 224.

<sup>7</sup> As to "judicial admissions," and "admissions acted upon," which sometimes are classed among estoppels in pais, see post, §§ 772, 783, 820, et seq., 839, et seq.

premises, shall not deny that the landlord, under whom he has entered, or from whom he has taken a renewal of his holding,<sup>1</sup> and to whom he has paid rent, had title at the time of his admission.<sup>2</sup> Thus, whether the landlord brings ejectment, or an action for rent or for use and occupation against his tenant, the defendant can neither set up the superior title of a third person,<sup>3</sup> nor show that the landlord has no title; as, for instance, if the plaintiff be an incumbent, by giving evidence of a simoniacal presentation,<sup>4</sup> or, if he be a devisee, by proving that the devisor was incapable of making a will.<sup>5</sup> In this last case, indeed, the evidence might be admissible as part of the tenant's case, if he could show that the party claiming as devisee had been guilty of fraud in making the will, and in falsely representing it to him as a valid one;<sup>6</sup> but, excepting in the instance of a clear case of fraud being established, the only course which a tenant can pursue, who wishes to dispute the title of the landlord under whom he entered, is to yield up the premises, and then bring an action to recover them.<sup>7</sup> So strict is this rule, that, even should a landlord, while proving his own case, in an action against the tenant for use and occupation, disclose the fact that he himself had only an equitable or a joint estate in the premises, the tenant cannot avail himself of that circumstance as a defence to the action.<sup>8</sup> Neither can a lessee, who has once accepted a lease and paid rent under it, dispute the lessor's title, though the deed itself admits upon its face some infirmity in that title.<sup>9</sup> And where a tenant has held premises under a corporation aggregate, and paid rent, he cannot object to their suing him for use and occupation, on the ground that a corporation cannot demise except by deed, and

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<sup>1</sup> *Doe v. Wiggins*, 4 Q. B. 367.

<sup>2</sup> *Doe v. Pegge*, 1 T. R. 760, n., per *Ld. Mansfield*; *Doe v. Barton*, 11 A. & E. 307, 312; 3 P. & D. 194, S. C. See *Att.-Gen. v. Stephens*, 1 Kay & J. 744—747, per *Wood*, V.-C.; 6 De Gex, M. & G. 111, S. C.

<sup>3</sup> *Doe v. Pegge*, 1 T. R. 760, n., per *Ld. Mansfield*.

<sup>4</sup> *Cooke v. Loxley*, 5 T. R. 4.

<sup>5</sup> *Doe v. Wiggins*, 4 Q. B. 367.

<sup>6</sup> Per *Ld. Denman*, in *Id.* 375.

<sup>7</sup> Per *Coleridge, J.*, in *Id.* 377; *Doe v. Lady Smythe*, 4 M. & Sel. 348. See *Rules of Sup. Ct. 1883*, Ord. XVIII., R. 2; App. C. sect. VII.

<sup>8</sup> *Dolby v. Iles*, 11 A. & E. 335.

<sup>9</sup> *Duke v. Ashby*, 7 H. & N. 600; *Morton v. Woods*, 3 Law Rep. Q. B. 656; 37 L. J., Q. B. 242, S. C.; 4 Law Rep., Q. B. 293, S. C., in *Ex. Ch.*; & 9 B. & S. 632.

that he has occupied without deed.<sup>1</sup> This rule, too, is applicable in an action of trespass, as well as in an action to recover land;<sup>2</sup> and it is binding, not only on the tenant himself, but on all who claim in any way through him.<sup>3</sup> Thus, where a lessee gave up possession of the premises to a party claiming them by a title adverse to that of the lessor, and prior to the lease, that party was held to be estopped, as the lessee would have been, from disputing the landlord's title.<sup>4</sup> The principle of this rule extends also to the case of a person coming in by permission as a mere lodger, a servant, or other licensee.<sup>5</sup>

§ 102. But though a tenant cannot deny that the person by whom he was let into possession had title at the commencement of the tenancy, he may show that he had no title at a previous time. Thus, where in ejectment the defendant claimed under a conveyance from a certain company, bearing date 1824, he was allowed to dispute the title of the company to convey the same premises to the lessor of the plaintiff in 1818.<sup>6</sup> So, where a lessee had been let into possession in 1826 under a demise from a tenant for life, and after the death of the tenant for life an ejectment was brought against him by the reversioner, on the ground that the lease was void, the court, while they admitted that the interests of the tenant for life and of the reversioner were so far identical, as to preclude the lessee from showing adverse title in another at

<sup>1</sup> *May. of Stafford v. Till*, 4 Bing. 75; 12 Moore, 260, S. C.; *Dean and Ch. of Rochester v. Pierce*, 1 Camp. 466; recognised in *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 194. See *Eccles. Commis. v. Merral*, 4 Law Rep., Ex. 162; 38 L. J., Ex. 93, S. C.; also post, § 984.

<sup>2</sup> *Delaney v. Fox*, 26 L. J., C. P. 248; 2 Com. B., N. S. 768, S. C.; qualifying a dictum of Pollock, C. B., in *Watson v. Lane*, 25 L. J., Ex. 102. See, also, *Ward v. Ryan*, 1 R. 10 C. L. 17, per Ex. C.

<sup>3</sup> *Lond. & N.-West. Ry. Co. v. West*, 2 Law. Rep., C. P. 553; 36 L. J., C. P. 245, S. C.

<sup>4</sup> *Doe v. Mills*, 2 A. & E. 17; *Doe v. Lady Smythe*, 4 M. & S. 347; *Taylor v. Needham*, 2 Taunt. 278.

<sup>5</sup> *Doe v. Baytup*, 3 A. & E. 188. In this case a woman asked leave to get vegetables in the garden, and having obtained the keys for this purpose, fraudulently took possession of the house and set up a title. The court held that she could not defend an ejectment, but must deliver up the premises before she contested the title. See, also, *Doe v. Birchmore*, 9 A. & E. 662.

<sup>6</sup> *Doe v. Powell*, 1 A. & E. 531.



the date of the lease, allowed him to prove that, before the year 1826, the legal estate was outstanding in a third party, and that, consequently, the reversioner, who claimed in common with the tenant for life under a settlement of a much earlier date, had no legal title to the premises.<sup>1</sup> Again, a tenant may prove that, since the commencement of the tenancy, the title of his lessor has expired or been defeated.<sup>2</sup> Thus, he may prove that his landlord was a tenant pour autre vie, and that the cestui que vie is dead; or that he was a tenant from year to year, and that the superior landlord had given him a notice to quit, or that he was a mere tenant at will, and that the will had been determined.<sup>3</sup> So, also, the tenant may show, that the person who let him in was a mortgagor in possession, who, not being treated as a trespasser, had title to confer on him the legal possession; and he may then further prove that this party has subsequently been treated as a trespasser, whereby both the mortgagor's title, as well as his own rightful possession under him, have been determined.<sup>4</sup> In short, he may rely on any fact, which either amounts to an eviction by title paramount,<sup>5</sup> or shows that the title of his landlord has expired.<sup>6</sup>

<sup>1</sup> Doe v. Langdon, 12 Q. B. 712; Doe v. Whitroe, D. & R., N. P. C. 1.

<sup>2</sup> Doe v. Barton, 11 A. & E. 312, per Ld. Denman; Hopcraft v. Keys, 9 Bing. 613. See Bayley v. Bradley, 5 Com. B. 396; Watson v. Lane, 11 Ex. R. 769; Langford v. Selmes, 3 Kay & J. 220; Howe v. Scarrott, 4 H. & N. 723; Lond. & N.-West. Ry. Co. v. West, 36 L. J., C. P. 245; 2 Law Rep., C. P. 553, S. C.

<sup>3</sup> Doe v. Barton, 11 A. & E. 314.

<sup>4</sup> Id. p. 315. It is now determined that a mortgagor, by simply giving notice to the tenant to pay rent to him, does not treat the mortgagor as a trespasser; Hickman v. Machin, 4 H. & N. 716; but a notice, to have such an effect, must either be coupled with an attornment, or be followed by actual payment of rent, to the mortgagee. See id.; also Wilton v. Dunn, 17 Q. B. 294; Turner v. Cameron's Coalbrook St. Coal Co., 5 Ex. R. 932; Litchfield v. Ready, id. 939; Trent v. Hunt, 9 Ex. R. 22, 23.

<sup>5</sup> Gouldsworth v. Knights, 11 M. & W. 344.

<sup>6</sup> Downs v. Cooper, 2 Q. B. 256. In that case, A. demised premises to B., and during the term C. claimed the property. The matter was referred, and the arbitrator awarded in C.'s favour. A. thereupon delivered up the title deeds to C., and permitted him to tell B. to pay the rent in future to him, C. This B. did, but A. afterwards distrained for the same rent. On replevin, avowry, and plea in bar stating the above facts, held that A.'s title had expired; that his conduct was an admission of that fact, and that B. was not estopped from alleging it; and per Ld. Denman, that A., having induced B. to pay rent to C., was estopped from setting up his relation of landlord

§ 103. As to what constitutes a letting into possession, some doubts exist. In one case, where a party was in possession of premises without leave obtained from any one, and a person came to him and said, "You have no right to the premises," upon which he acquiesced, and took a lease from this person, the court held that the relation of landlord and tenant was sufficiently created to debar the one from disputing the title of the other.<sup>1</sup> But in a subsequent case, where a tenant, being already in possession of premises under a demise from a termor, had at the expiration of the termor's right, when his own title also expired, entered into a parol agreement with another party to hold the premises under him; but it appeared that he had done so in ignorance of the real facts of the case, and under the supposition that this party was entitled to the premises; it was held that the agreement was not equivalent to the first letting into possession.<sup>2</sup> This question may, in certain cases, become highly important, because neither a parol agreement by a tenant to hold premises of a party, by whom he was *not let into possession*,<sup>3</sup> nor an attornment,<sup>4</sup> nor an actual payment of rent to such party, even under a distress,<sup>5</sup> will in themselves operate as estoppels; but the tenant may still show that he has acted in ignorance, or under a misapprehension of the real circumstances,<sup>6</sup> or, in

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against B. See *Doe v. Watson*, 2 Stark. R. 230; *Doe v. Seaton*, 2 C. M. & R. 728; *Claridge v. Mackenzie*, 4 M. & Gr. 152; *Mountnoy v. Collier*, 22 L. J., Q. B. 124; 1 E. & B. 630, S. C.; *Emery v. Barnett*, 27 L. J., C. P. 216; *Delmege v. Mullins*, 1 R. 9 C. L. 209, per Ex. Ch.

<sup>1</sup> *Doe v. Mills*, 2 A. & E. 20, per Patteson, J. See also *Dolby v. Hies*, 11 A. & E. 335.

<sup>2</sup> *Claridge v. Mackenzie*, 4 M. & Gr. 143; 4 Scott, N. R. 726, S. C. "The witness speaks of a new agreement having been entered into between the plaintiff and the defendant, that the former should continue in possession as tenant to the latter; but there was no *new* possession given by the defendant; she was in no way prejudiced; she could not have turned the plaintiff out of possession; and before their agreement, if she had brought her ejectment, the plaintiff might have shown that she had no title, and that the title was in some one else. It is not like the case of a person letting another into possession of vacant premises; it is in fact a remaining in possession of premises, which had been formerly occupied by the tenant." Per Tindal, C. J., 4 M. & Gr. 152.

<sup>3</sup> *Id.*

<sup>4</sup> *Doe v. Brown*, 7 A. & E. 447.

<sup>5</sup> *Knight v. Cox*, 18 Com. B. 645, S. C., nom. *Cox v. Knight*, 25 L. J., C. P. 314.

<sup>6</sup> *Gregory v. Doidge*, 3 Bing. 474; 11 Moore, 394, S. C.; *Gravenor v. Woodhouse*, 1 Bing. 38; 7 Moore, 289, S. C.; *Rogers v. Pitcher*, 6 Taunt. 202; 1 (2992)

the case of payment of rent, that some other party was entitled to receive it.<sup>1</sup>

§ 104.<sup>2</sup> Conclusive presumptions of law are also made with re- § 91  
spect to *infants*.<sup>3</sup> Thus, an infant under the age of seven years is conclusively presumed to be incapable of committing any felony, or, indeed, any indictable offence,<sup>4</sup> for want of discretion;<sup>5</sup> and under fourteen a male infant is presumed incapable, on the ground of impotency, of committing a rape as a principal in the first degree,<sup>6</sup> or even of committing an assault with intent to perpetrate that crime.<sup>7</sup> So, a female under the age of twelve years is presumed incapable of consenting to sexual intercourse,<sup>8</sup> and under the age of thirteen her consent to any act of indecency cannot be set up as a defence to a charge of assault.<sup>9</sup> An infant under the age of twenty—  
Marsh. 541, S. C.; Doe v. Barton, 11 A. & E. 313; 3 P. & D. 194, S. C.; Hall v. Butler, 10 A. & E. 206, per Patteson, J.

<sup>1</sup> Cooper v. Blandy, 1 Bing., N. C. 49, 50; Doe v. Francis, 2 M. & Rob. 57; in which case payment of rent being the only evidence of tenancy, Patteson, J., allowed the defendant to show, that the lessor of the plaintiff had acted as the agent of third parties. See Hitchings v. Thompson, 5 Ex. R. 50, explained by Ld. Cranworth, C., in Att.-Gen. v. Stephens, 6 De Gex, M. & G. 141.

<sup>2</sup> Gr. Ev. § 28, in part.

<sup>3</sup> In all civil questions where the rights of parents depend on the birth of a living child, the Scotch law conclusively presumes that the child was not born alive, if it was not heard to cry. 1 Dickson, Ev. 180.

<sup>4</sup> 42 & 43 V., c. 49, § 10, subs. 5.

<sup>5</sup> 4 Bl. Com. 23; 1 Hale, 27. If an infant under seven is given into custody on a charge of felony, an action for false imprisonment will lie; Marsh v. Lowder, 2 New R. 280, per C. P.; S. C., nom. Marsh v. Loader, 14 Com. B., N. S. 535.

<sup>6</sup> 1 Hale, 630; 1 Russ. C. & M. 676. This presumption is not affected by 24 & 25 V., c. 100, § 48; R. v. Groombridge, 7 C. & P. 582, per Gaselee, J., and Ld. Abinger; and it applies to the offence of carnally abusing a girl under twelve years of age; R. v. Jordan, 9 C. & P. 118, per Williams, J. But if the boy have a mischievous discretion, he may be a principal in the second degree, 1 Hale, 630. The patient may be convicted of an unnatural crime, though the agent be under fourteen; R. v. Allen, 1 Den. 364; 2 C. & Kir. 169, S. C.

<sup>7</sup> R. v. Eldershaw, 3 C. & P. 396, per Vaughan, B.; R. v. Philips, 8 C. & P. 736, per Patteson, J.

<sup>8</sup> 38 & 39 V., c. 94, § 3; 24 & 25 V., c. 100, § 52. See R. v. Beale, 10 Cox, 157; 1 Law Rep., C. C. 10, S. C. Between the ages of twelve and thirteen the consent of the girl only reduces the man's crime from felony to misdemeanor, 38 & 39 V., c. 94, § 4.

<sup>9</sup> 43 & 44 V., c. 45, § 2; R. v. Roadley, 14 Cox, 463; 49 L. J., M. C. 88, (2993)

one years is presumed to be so far incapable of managing his own affairs, that he cannot, in general,<sup>1</sup> alien his land, or execute a deed,<sup>2</sup> or state an account, or bind himself by any contract,<sup>3</sup> unless it be for necessities;<sup>4</sup> or be subjected to a receiving order being made against him under the Bankruptcy laws;<sup>5</sup> neither since the first of January, 1838, has he had any power to make a will, whether it purports to dispose of real or of personal estate;<sup>6</sup> though, before that date, boys of fourteen years, and girls of twelve, might have disposed of personalty by will, provided they were proved to have been of sufficient discretion.<sup>7</sup>

S. C. If this case ever was sound law, it is no longer so, in consequence of the above enactment.

<sup>1</sup> See 18 & 19 V., c. 43, and 23 & 24 V., c. 83, Ir., which Acts enable male infants, who are at least twenty years old, and female infants, who are at least seventeen years old, to make, with the approbation of the Chancery Division, binding settlements of their real and personal estate on marriage. Infants may also be members of friendly societies, 38 & 39 V., c. 60, § 15, subs. 8.

<sup>2</sup> See *Martin v. Gale*, L. R. 4 Ch. D. 428, where held by Jessel, M. R., that a deed by an infant charging his reversionary interest to secure the repayment of money advanced to him for necessities, was voidable and could not be enforced.

<sup>3</sup> The Act of 37 & 38 V., c. 62, which was passed on 7th August, 1874, enacts, in § 1, that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied, other than contracts for necessities, and all accounts stated with infants, shall be absolutely void; Provided that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." As to how far an infant can act as a trustee, or exercise a power, see *King v. Bellord*, 1 Hem. & M. 343, and authorities there cited; also *In re Arnit's Trusts*, I. R., 5 Eq. 352; *In re D'Angibau*, 49 L. J., Ch. 182, per Jessel, M. R.; S. C. on App., 49 L. J., Ch. 756; and L. R., 15 Ch. D. 228.

<sup>4</sup> 1 Bl. Com. 465, 466; Co. Lit. 78 b. As to what are necessities, see ante, § 42. As to how far infant shareholders are liable to actions for calls, see *Newry & Ennisk. Ry. Co. v. Combe*, 5 Rail. Cas. 633; 3 Ex. R. 565, S. C.; *Leeds & Thirsk Ry. Co. v. Fearnley*, 5 Rail. Cas. 644; 4 Ex. R. 26, S. C.; *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B. 935; *N. West. Ry. Co. v. McMichael*, 5 Ex. R. 114; *Birkenhead, Lanc. & Chesh. Junc. Ry. Co. v. Pilcher*, id. 121. An infant lessee, though not liable on the contract of tenancy, is answerable for the rent during his occupation of the premises, *Blake v. Concannon*, I. R., 4 C. L. 323. But see *Lempriere v. Lange*, L. R., 12 Ch. D. 675, per Jessel, M. R.

<sup>5</sup> *Re Jones ex p. Jones*, 50 L. J., Ch. 673, per Ct. of App.; L. R. 18 Ch. D. 109, S. C.

<sup>6</sup> 7 W. 4 & 1 V., c. 26, §§ 7, 34.

<sup>7</sup> 1 Will. on Ex. 14—16.

§ 105. With respect to the period of life, at which the possibility of having issue, without miraculous agency,<sup>1</sup> becomes in women extinct, no rigid presumption has been fixed by the law; but courts of equity, in directing the distribution of trust funds, have been in the habit of assuming that females, after arriving at the age of fifty-three, are in general past child-bearing.<sup>2</sup> § 91A

§ 106. Again, the law in certain cases recognises a conclusive presumption in favour of *legitimacy*.<sup>3</sup> Thus, where the husband and wife have cohabited together, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is shown to have been, at the same time, guilty of infidelity;<sup>4</sup> and even where the parents are living separate, a strong presumption of legitimacy still arises, which can only be rebutted, either by proving a divorce a mensa et thoro, or, since the 11th of January, 1858, a judicial separation, or by cogent and almost irresistible proof of non-access in a sexual sense.<sup>5</sup> The fact that a woman is living in notorious adultery, though of course it amounts to very strong evidence, is not, in itself, quite sufficient to repel this presumption.<sup>6</sup> But where the parents have been either divorced a § 92

<sup>1</sup> See Gen., ch. xvii., vv. 15—19; ch. xviii., vv. 9—15, and ch. xxi., vv. 1—7.

<sup>2</sup> *Haynes v. Haynes*, 35 L. J., Ch. 303, per Kindersley, V.-C., and cases there cited in the note. See, also, re *Widdow's Trusts*, 11 Law Rep., Eq. 408, per Malins, V.-C.; 40 L. J., Ch. 380, S. C.; and re *Millner's Estate*, 14 Law Rep., Eq. 245; 42 L. J., Ch. 44, S. C. In this last case a woman was presumed to be barren at the age of forty-nine years and nine months, as she had been married for twenty-six years, and had never had a child. But in *Croxtan v. May*, L. R., 9 Ch. D. 388, the Court of Appeal refused to regard a woman as past child-bearing, though her age was fifty-four and a half years, and she had had no child, having been married three years. Sed qu., and see *Davidson v. Kimpton*, L. R., 18 Ch. D. 213. <sup>3</sup> See ante, § 16.

<sup>4</sup> *Cope v. Cope*, 1 M. & Rob. 269, 276; 5 C. & P. 604, S. C.; *Morris v. Davies*, 3 C. & P. 215, 427; 5 Cl. & Fin. 163, S. C.; *Wright v. Holdgate*, 3 C. & Kir. 158; *Legge v. Edmonds*, 25 L. J., Ch. 125; *Banbury Peer.*, in Appendix, n. E. to *Le Marchant's Gardner's Peer.*, Selw. N. P. 748—750; and 1 Sim. & St. 153, S. C.; *R. v. Luffe*, 8 East, 193. As to the Mahomedan Law on this subject see *Ashrufood Dowlah Ahmed v. Hyder Hossein Khan*, 11 Moo. Ind. App. C. 94.

<sup>5</sup> *Id.*; *Saye and Sele Peer.*, 1 H. of L. Cas. 507; *Hargrave v. Hargrave*, 9 Beav. 552; *Plowes v. Bossey*, 2 Drew. & Sm. 145; 31 L. J., Ch. 681, S. C. per Kindersley, V.-C.; *Atchley v. Sprigg*, 33 L. J., Ch. 345, per *id.*

<sup>6</sup> *R. v. Mansfield*, 1 Q. B. 444, 450, 451; 1 G. & D. 7, S. C. In this case

mensa et thoro, or judicially separated, their children born during the separation are *prima facie* illegitimate.<sup>1</sup>

§ 107.<sup>2</sup> Conclusive presumptions are not unknown to the law of § 93 nations. Thus, if a neutral vessel be found carrying despatches of the enemy between different parts of the enemy's dominions, their effect is presumed to be hostile,<sup>3</sup> at least if they have been fraudulently concealed. The *spoliation of papers* by the captured party has been regarded, in all the States of Continental Europe, as conclusive proof of guilt; but in England and America such an act is open to explanation, unless the cause otherwise labours under grave suspicion, or the surrounding circumstances establish a case of bad faith or of gross prevarication.<sup>4</sup> Still, though our law, in its lenity, does not found on the mere spoliation of papers an absolute presumption of guilt, it only stops short of that result; for a case that escapes with such a brand upon it, is saved, as it were, from the fire.<sup>5</sup> Again, the maritime law recognizes a presumption all but conclusive against any vessel, which has been captured while entering a blockaded port; and the only mode by which the owner can protect the ship from being condemned as lawful prize, is by establishing a justification on the ground of imperative necessity.<sup>6</sup> When a ship, too, is condemned for breach of blockade, the cargo almost inevitably follows the same fate; for the law conclusively presumes that the owners of the cargo were privy to the intention of violating the blockade, unless they can prove that, at the time when the shipment was made, they could not have known that the blockade had been imposed.<sup>7</sup>

§ 108.<sup>8</sup> In these cases of conclusive presumption, the rule of law § 94 merely attaches itself to the circumstances when proved; it is not

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Ld. Denman questions the authority of *Cope v. Cope*, as reported in 5 C. & P. 604. See *Hawes v. Draeger*, L. R., 23 Ch. D. 173, per Kay, J.; 52 L. J., Ch. 449, S. C.

<sup>1</sup> *St. George v. St. Margaret*, 1 Salk. 123.

<sup>2</sup> Gr. Ev. § 31, in part.

<sup>3</sup> *The Atalanta*, 6 Rob. Adm. 440, 454.

<sup>4</sup> *The Pizarro*, 2 Wheat. 227, 241, 242, n. c; *The Hunter*, 1 Dods. Adm. 480. See post, § 116.

<sup>5</sup> *The Hunter*, 1 Dods. Adm. 486, 487, per Sir W. Scott.

<sup>6</sup> *Baltazzi v. Ryder*, 12 Moo. P. C. R. 168.

<sup>7</sup> Id.

<sup>8</sup> Gr. Ev. § 32, almost verbatim.

deduced from them. It is not a rule of inference from testimony, but a rule of protection, as expedient, and for the general good. It does not, for example, assume that all landlords have good titles; but that it will be a public inconvenience to suffer tenants to dispute them. Neither does it assume that all averments and recitals in deeds and records are true; but that it will be mischievous if parties are permitted to deny them. It does not assume that all simple contract debts, of six years' standing, are paid, nor that every man quietly occupying land twenty years as his own, has a valid title by grant; but it deems it expedient that claims opposed by such evidence as the lapse of those periods affords, should not be countenanced; and it considers that society is more benefited by a refusal to entertain such claims, than by suffering them to be made good by proof. In fine, it does not assume the impossibility of things which are possible; on the contrary, it is founded, not only on the possibility of their existence, but on their occasional occurrence; and it is against the mischiefs of their occurrence that it interposes its protecting prohibition.<sup>1</sup>

§ 109.<sup>2</sup> The *second* class of presumptions of law,—answering to § 95 the *præsumptiones juris* of the Roman law, which may always be overcome by opposing proof,<sup>3</sup>—consists of those termed *disputable presumptions*. These, as well as the former, are the result of the general experience of a connexion between certain facts or things, the one being usually found to be the companion, or the effect, of the other. The connexion, however, in this class is not so intimate, or so uniform, as to be conclusively presumed to exist in every case; yet it is so general, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode *the law*,—even in the absence of any corresponding allegation in the pleading,<sup>4</sup>—defines the nature and amount of the evidence which is sufficient to establish a *prima facie* case, and to throw the burden of proof on the other party; and if no opposing evidence is offered,

<sup>1</sup> See 6 Law Mag. 348, 355, 356.

<sup>2</sup> Gr. Ev. § 33, in great part.

<sup>3</sup> Hein. ad Pand. P. iv. § 124.

<sup>4</sup> Rules of Sup. Ct., 1883, Ord. xix., r. 25, cited post, § 368, n.

the jury are bound to find in favour of the presumption. A contrary verdict might be set aside as being against evidence.

§ 110.<sup>1</sup> The rules in this class of presumptions, as in the former, have been adopted by common consent, from motives of public policy, and for the promotion of the general good; yet not, as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised. Thus, as men do not generally violate the penal code, the law presumes every man *innocent*; but some men do transgress it; and therefore evidence is received to repel this presumption. § 96

§ 111. Such being the nature of disputable presumption of law, it is obvious that, theoretically, they differ from mere presumptions of fact in three important particulars. In the first place, the judge is bound to explain to the jury whatever legal presumptions arise from the facts proved;<sup>2</sup> next, the jury are bound to give full weight to the presumptions so explained; and lastly, the court alone, without the intervention of the jury, may draw the proper legal inferences, whenever the requisite facts are developed in the pleadings.<sup>3</sup> In practice, however, the distinction between the two species of presumptions is by no means well defined, and the line of demarcation, even when visible at all, is often overlooked.<sup>4</sup> A presumption which is regarded by some judges as one of law, is treated by others as one of fact; nay, the same judges place the same presumption at different times in different classes, as if for the purpose of illustrating "the blessings," which one of their body has declared that "we enjoy, in rules capable of flexible interpretation."<sup>5</sup> The following remarks, which principally apply to disputable presumptions of law, will be found occasionally to extend, from motives of convenience, to cogent presumptions of fact. § 97

X § 112. One of the most important legal presumptions is that of § 97A

<sup>1</sup> Gr. Ev. § 34, almost verbatim.

<sup>2</sup> Ante, § 25.

<sup>3</sup> Best, Ev. 404, 405.

<sup>4</sup> Best, Ev. 424.

<sup>5</sup> Per Talfourd, J. See Letters of the Judges to the Chancellor on the Crim. Law Bills of 1853, p. 37.



*innocence.* This presumption, which, in legal phraseology, "gives the benefit of a doubt to the accused," is so cogent, that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty.<sup>1</sup> In mere civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burthen of proof, may constitute sufficient ground for a verdict;<sup>2</sup> but to affix on any person the stigma of crime requires a higher degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt.<sup>3</sup> It has sometimes been asserted with more or less precision, that the presumption in question is confined to the criminal courts, being there specially adopted in favour of life and liberty, and as a safeguard against error in convictions which are not open to revision.<sup>4</sup> But this would seem to be a mistake. The arguments just cited are admirable reasons for urging juries to exercise more than ordinary caution in the investigation of grave offences, but the presumption itself appears to rest on a broader basis. The right which every man has to his character, the value of that character to himself and his family, and the evil consequences that would result to society if charges of guilt were lightly entertained, or readily established in courts of justice:—these are the real considerations which have led to the adoption of the rule that all imputations of crime must be strictly proved. The rule, then, is recognised alike by all tribunals, whether civil or criminal, and is equally effective in all proceedings, whether the question of guilt be directly or incidentally raised.<sup>5</sup> For example, if an action be brought against an insurance company to recover a loss by fire, and the defendants plead that the plaintiff wilfully burnt down the

<sup>1</sup> St. Ev. 817, 865, 4th ed.; 1 Gr. Ev. § 13 a; R. v. White, 4 Fost. & Fin. 383, per Martin, B.

<sup>2</sup> St. Ev. 818, 4th ed.; 1 Gr. Ev. § 13 a; Best, Ev. 120; Cooper v. Slade, 6 H. of L. Cas. 772, per Willes, J.

<sup>3</sup> St. Ev. 817, 865, 4th ed.; Best, Ev. 120.

<sup>4</sup> Magee v. Mark, 11 Ir. Law R., N. S. 449, 463, per Pigot, C. B.; Best, Ev. 120; 1 Gr. Ev. § 13 a.

<sup>5</sup> Best, Ev. 447.

premises, the jury, before they find a verdict against the plaintiff must be satisfied that the crime imputed to him was proved by as clear evidence as would justify a conviction for arson.<sup>1</sup> So, the offence of forgery or bigamy must be established by the same strict evidence, whether the question arises in a penal court on a prosecution for any such crime, or in a civil court on a plea of justification to a libel.<sup>2</sup>

§ 113.<sup>3</sup> So strong is the presumption of *innocence*, that even where guilt can be established only by proving a negative, that negative must, in most cases to which no special statute is applicable,<sup>4</sup> be proved, though the general rule of law devolves the burthen of proof on the party holding the affirmative. Thus, where the plaintiff complained that the defendant, who had chartered his ship, had put on board an article highly inflammable and dangerous, *without giving notice* of its nature to the master in charge, whereby the vessel was burnt, he was held bound to prove this negative averment.<sup>5</sup> § 98

§ 114.<sup>6</sup> Questions of nicety occasionally arise where the presumption of innocence is met by some counter presumption.<sup>7</sup> Thus, where a woman, twelve months after her husband (a soldier on foreign service) was last heard of, married a second husband, by whom she had children, it was held that the Court of Quarter Sessions, upon a question respecting the settlement of these children, § 99

<sup>1</sup> Thurtell v. Beaumont, 1 Bing. 339; 8 Moore, 612, S. C.

<sup>2</sup> Chalmers v. Shackell, 6 C. & P. 475, per Tindal, C. J.; Willmetts v. Harmer, 8 C. & P. 695, per Ld. Denman. See, also, Neeley v. Lock, 8 C. & P. 532, per Tindal, C. J.; Magee v. Mark, 11 Ir. Law R., N. S. 449, per Fitzgerald, B.

<sup>3</sup> Gr. Ev. § 35, in part.

<sup>4</sup> See post, § 372.

<sup>5</sup> Williams v. E. Ind. Co., 3 East, 193; B. N. P. 298. So of allegations that a party had not taken the Sacrament, R. v. Hawkins, 10 East, 211; *affd.* in Dom. Proc. 2 Dow, 124; or had not complied with the Act of uniformity, &c., Powell v. Milburn, 3 Wils. 355, 366; or that goods were not legally imported, Sissons v. Dixon, 5 B. & C. 758; or that a theatre was not duly licensed, Rodwell v. Redge, 1 C. & P. 220. See post, § 371.

<sup>6</sup> Gr. Ev. § 35, in part.

<sup>7</sup> See Middleton v. Barned, 4 Ex. R. 241; R. v. Bjornsen, 1 L. & Cave, 545; 10 Cox, 74; 34 L. J., M. C. 180, S. C.

was justified in presuming that the first husband was dead at the time of the second marriage, though, had it not been for the presumption of innocence, *that* of the continuance of life would have prevailed.<sup>1</sup> So, on a trial for bigamy, where a woman had married again only four years after she had separated from her first husband, the court held that the *law* could not presume the continuance of the first husband's life, but that it was a question of fact for the jury whether he was alive or dead at the date of the second marriage.<sup>2</sup> But, in another case, where the point in issue was the derivative settlement of a man's second wife, and a letter was proved to have been written by the first wife from Van Diemen's Land, bearing date only twenty-five days prior to the second marriage, the court confirmed the order of the Sessions, which rested on the presumption that the husband had been guilty of bigamy.<sup>3</sup> So, where a cabman was indicted for manslaughter by driving his cab over a woman, the fact that the woman had been killed by the accident was in itself regarded by the court as *prima facie* evidence of negligence, sufficient to rebut the presumption of innocence, and to shift on to the driver the burthen of proving that he had exercised due care in the management of his horse.<sup>4</sup>

§ 115. An exception to this rule respecting the presumption of § 100  
innocence, is admitted in some cases of agency; the principle of law being, both in criminal and civil cases, that a person is liable for what is done under his presumed authority.<sup>5</sup> Thus, on an indictment against a contract baker for selling unwholesome bread, where it appeared that the defendant allowed his foreman to use

<sup>1</sup> *R. v. Twynning*, 2 B. & A. 386. See *R. v. Jones*, 52 L. J., M. C. 96; 15 Cox, 284, S. C.

<sup>2</sup> *R. v. Lumley*, 1 Law Rep., C. C. 196; 38 L. J., M. C. 86; 11 Cox, 274, S. C.; *R. v. Willshire*, L. R., 6 Q. B. D. 366; 50 L. J., M. C. 57; and 14 Cox, 541, S. C. See further, *R. v. Jones*, 11 Cox, 358; and see, as to the presumption of life, §§ 198—203, post.

<sup>3</sup> *R. v. Harborne*, 2 A. & E. 540; *R. v. Mansfield*, 1 Q. B. 449. See, also, *Lapsley v. Grierson*, 1 H. of L. Cas. 498; and the *Breadalbane* case, 1 Law Rep., H. L., Sc. 182, cited post, § 172.

<sup>4</sup> *R. v. Cavendish*, 1 R., 8 C. L. 178.

<sup>5</sup> See post, §§ 905, 906. See, also, *Cooper v. Slade*, 6 H. of L. Cas. 746, 793, 794, per *Ld. Wensleydale*.

alum, though not in such quantities as to render the bread unwholesome, Lord Ellenborough held that he might legally be convicted, on proof that the servant had introduced alum into the bread to a deleterious extent.<sup>1</sup> So, for the purposes of the Pawnbrokers' Act, 1872, "anything done or omitted by the servant, apprentice, or agent of a pawnbroker, in the course of or in relation to the business," shall be deemed to be done or omitted by the pawnbroker.<sup>2</sup> So, the directors of a gas company were held criminally answerable, on an indictment for a nuisance, for an act done by the superintendent and engineer, under a general authority to manage the works, though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose was discontinued.<sup>3</sup> In like manner, where a libel is sold in a bookseller's shop by his servant in the ordinary course of his employment, this is evidence of a guilty publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. This exception is founded upon public policy, lest irresponsible persons should be put forward, and the principal and real offender shall escape. But such evidence is not conclusive against the master, who may still prove, under the plea of not guilty, that the publication was in fact made "without his authority, consent, or knowledge," and that there was "no want of care or caution on his part."<sup>4</sup> The

<sup>1</sup> *R. v. Dixon*, 4 Camp. 12; 3 M. & S. 11, S. C. See *Att.-Gen. v. Riddle*, 2 C. & J. 493; 2 Tyr. 523, S. C.; and *Searle v. Reynolds*, 7 B. & S. 704.

<sup>2</sup> 35 & 36 V., 93, § 8.

<sup>3</sup> *R. v. Medley*, 6 C. & P. 292. *Ld. Denman*, in summing up, observed: "It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided you think that they gave authority to the superintendent to conduct the works, they will be answerable. It seems to be both common sense and law, that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants," 299. See *R. v. Stephens*, 1 Law Rep., Q. B. 702; 35 L. J., Q. B. 251; 10 Cox, 340; 7 B. & S. 710, S. C.; *Mullins v. Collins*, 9 Law Rep., Q. B. 292; and *Betts v. Vitre*, 3 Law Rep., Ch. Ap. 442, per Lord Chelmsford, Ch. But see also, *Dickinson v. Fletcher*, 43 L. J., M. C. 25; 9 Law Rep., C. P. 1, S. C.; *Somerset v. Hart*, 53 L. J., M. C. 77.

<sup>4</sup> *Gr. Ev.* § 36, in part.

<sup>5</sup> 6 & 7 V., c. 96, § 7. As to the law before the stat., see 1 Russ. C. & M. 251; *R. v. Gutch*, M. & M. 433; *Harding v. Greening*, 8 Taunt. 42; *R. v. Alman*, 5 Burr. 2686.

same law is applied to the publishers of newspapers,<sup>1</sup> and to the owners of alkali works.<sup>2</sup>

§ 116.<sup>3</sup> The presumption of innocence may be overthrown, and § 101  
a *presumption of guilt* be raised, by the misconduct of the party in suppressing or *destroying evidence*, which he ought to produce, or to which the other party is entitled.<sup>4</sup> Thus, the spoliation of papers, material to show the neutral character of a vessel, furnishes a strong presumption, *in odium spoliatoris*, against the ship's neutrality.<sup>5</sup> So, if any person on board a vessel, which is being chased by an officer of the preventive service, shall throw overboard, stave, or destroy any part of the lading, the vessel shall be forfeited, because the conduct of such person raises an almost irresistible presumption that the freight so made away with was legally liable to seizure.<sup>6</sup> So, the concealment on board a vessel of any goods, which are liable to duty, justifies the inference that the owner intended to defraud the customs, and the goods will consequently be forfeited.<sup>7</sup> A similar presumption is raised against a party, who, having obtained possession of papers from a witness, after the service of a subpoena duces tecum upon the latter for their production, withholds them at the trial.<sup>8</sup> The general rule is *omnia præsumentur contra spoliatorem*.<sup>9</sup> His conduct is attributed

<sup>1</sup> 1 Russ. C. & M. 251; R. v. Walter, 3 Esp. 21; 6 & 7 V., c. 96, § 7; R. v. Holbrook, L. R., 3 Q. B. D. 60; L. R., 4 Q. B. D. 42, S. C., on 2nd trial; 14 Cox, 185, S. C.; R. v. Ramsay, 15 Cox, 231.

<sup>2</sup> 44 & 45 V., c. 37, § 25.

<sup>3</sup> Gr. Ev. § 37, in great part.

<sup>4</sup> A remarkable instance of such presumption of guilt was formerly furnished by the Act of 21 J. 1, c. 27; according to which statute, if the mother of an illegitimate child endeavoured privately, either by drowning, or secret burying, or by any other way, to conceal its death, she was presumed to have murdered it, unless she could prove by one witness at the least that the child was born dead. This Act was probably copied from a similar edict of H. 2 of France, cited by Domat. But this unreasonable and barbarous rule is now rescinded both in England and America. See, as to the present English law, 24 & 25 V., c. 100, § 60.

<sup>5</sup> The Hunter, 1 Doda. Adm. 480; The Pizarro, 2 Wheat. 227; 1 Kent, Com. 157; ante, § 107.

<sup>6</sup> See 39 & 40 V., c. 36, § 180.

<sup>7</sup> See 39 & 40 V., c. 36, § 177.

<sup>8</sup> Leeds v. Cook, 4 Esp. 256.

<sup>9</sup> 2 Poth. Obl. 292; Dalston v. Coatsworth, 1 P. Wms. 731; Cowper v. Ld. Cowper, 2 P. Wms. 720, 748—752; R. v. Arundel, Hob. 109, explained in 2 P. Wms. 748, 749; D. of Newcastle v. Kinderley, 8 Ves. 363, 375; Gray v. Haig, 20 Beav. 219; Annealey v. E. of Anglesea, 17 How, St. Tr. 1430.

to his supposed knowledge that the truth would have operated against him. Thus, also, where the finder of a lost jewel would not produce it, the jury, under the direction of the judge, presumed against him, that it was of the highest value of its kind.<sup>1</sup> But if the defendant has been guilty of no fraud or improper conduct, and the only evidence against him is the delivery to him of the plaintiff's goods, of unknown quality, the presumption is that they were goods of the cheapest quality.<sup>2</sup>

§ 117.<sup>3</sup> The mere *fabrication of evidence* does not furnish of itself any presumption of law against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts; of which several instances are stated in the books.<sup>4</sup> Again, the exercise by a client of his undoubted right to prevent his solicitor from disclosing confidential communications, can form no just ground for adverse presumption against him.<sup>5</sup> Neither has the mere non-production of deeds or papers, upon notice, any other legal effect in general, than to admit the other party to prove their contents by parol,<sup>6</sup> and, as against the party refusing to produce them, to raise a *prima facie* presumption that they have been properly stamped.<sup>7</sup> It cannot, however, be denied, but that such conduct, in the absence of all excuse, is calculated to produce in the minds of the jury a very prejudicial effect against any person having recourse to it;<sup>8</sup> and if such person be charged with fraud or other misconduct, and the production of his papers would establish his guilt or innocence, the jury will be amply justified in presuming

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See, also, Sir S. Romilly's argument in *Ld. Melville's case*, 29 How. St. Tr. 1194, 1195; *Anon.*, 1 Ld. Ray. 731. In *Baker v. Ray*, 2 Russ. 73, the Ld. Ch. thought that this rule had in some cases been pressed a little too far.

<sup>1</sup> *Armory v. Delamirie*, 1 Str. 505; 1 Smith, L. C. 301, S. C.

<sup>2</sup> *Clunnes v. Pezzey*, 1 Camp. 8.

<sup>3</sup> Gr. Ev. § 37, as to first six lines.

<sup>4</sup> See 3 Inst. 232; *Wills*, Cir. Ev. 154.

<sup>5</sup> *Wentworth v. Lloyd*, 33 L. J., Ch. 688, per Ld. Chelmsford, in Dom. Proc.; 10 H. of L. Cas. 589, S. C.

<sup>6</sup> *Cooper v. Gibbons*, 3 Camp. 363.

<sup>7</sup> *Crisp v. Anderson*, 1 Stark. R. 35. See § 148, post.

<sup>8</sup> See *Roe v. Harvey*, 4 Burr. 2484, per Ld. Mansfield; *Bate v. Kinsey*, 1 C. M. & R. 41, per Ld. Lyndhurst; *Sutton v. Devonport*, 27 L. J., C. P. 54; *Edmonds v. Foster*, 45 L. J., C. P. 41.

him guilty from the unexplained fact of their non-production.<sup>1</sup> On the same principle, jurors will do well to regard with suspicion the conduct of any party, who, having it in his power to produce cogent evidence in support of his case, is content to offer testimony of a weaker and less satisfactory character.<sup>2</sup>

§ 118.<sup>3</sup> Though the general presumption of law is, as we have § 103 seen, in favour of innocence, yet, as men seldom do unlawful acts with innocent intentions, the law presumes that every act, which in itself is unlawful, has been wrongfully intended, till the contrary appears.<sup>4</sup> Thus, on a charge of murder, malice is presumed from the fact of killing, unaccompanied by circumstances of extenuation; and the burthen of disproving the malice is thrown upon the accused.<sup>5</sup> So, if an unauthorised party, with the view of raising money, has put the name of another person to a bill, a felonious intent will be presumed, unless the accused had reasonable grounds for believing that he was authorised to act as he did, and in fact acted on that belief.<sup>6</sup> The same presumption arises in civil actions, where the act complained of is unlawful. Thus, in actions of slander, though it should appear that the defendant was not actuated by ill-will against the plaintiff, malice *in law* will be inferred from the fact of intentional publication, unless the defendant can show that his language was excusable as a privileged communication, in which case the plaintiff must establish *actual* malice,<sup>7</sup> and in order to do so, must, either by extrinsic or by intrinsic evidence,<sup>8</sup> prove facts which are

<sup>1</sup> Clifton v. U. S., 4 Howard, S. Ct. R. 242.

<sup>2</sup> See N. York Civ. Code, § 1852, art. 6 & 7.

<sup>3</sup> Gr. Ev. § 34, as to first seven lines.

<sup>4</sup> *Ld. Mansfield* has, in clear language, pointed out the distinction between those cases, where a criminal intent must be *proved*, and those where it will be *presumed*:—"Where an act, in itself *indifferent*, if done with a particular intent becomes criminal, there the intent must be proved and found; but where the act is in itself *unlawful*, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." *R. v. Woodfall*, 5 Burr. 2667. See also *R. v. Harvey*, 2 B. & C. 257; *R. v. Wallace*, 3 Ir. Law R., N. S. 38; and *R. v. Creevey*, 1 M. & Sel. 273.

<sup>5</sup> *Post*, C. L. 255.

<sup>6</sup> *R. v. Beard*, 8 C. & P. 143, 148, 149, per Coleridge, J.

<sup>7</sup> *Clark v. Molyneux*, 14 Cox, 10, per Ct. of App.; 47 L. J., Q. B. 230; and *L. R.*, 3 Q. B. D. 237, S. C.

<sup>8</sup> *Cooke v. Wildes*, 5 E. & B. 328.

*inconsistent* with bona fides.<sup>1</sup> This distinction rests upon the ground that, when words are proved to have been spoken on a justifiable occasion, the law raises an antagonistic presumption, that the speaker was actuated by proper motives.<sup>2</sup> So, in other actions for damages founded on wrongs, as for a malicious arrest, a malicious prosecution, and the like, the fact that the defendant has had recourse to legal proceedings raises a *prima facie* inference in his favour,

<sup>1</sup> *Toogood v. Spyring*, 1 C. M. & R. 181, 193; 4 Tyr. 582, S. C.; *Whitfield v. South East. Rail. Co.*, 27 L. J., Q. B. 229; 1 E. B. & E. 115, S. C.; *Coxhead v. Richards*, 2 Com. B. 569; *Spill v. Maule*, 4 Law Rep., Ex. 232; *Wright v. Woodgate*, 2 C. M. & R. 573; Tyr. & Gr. 12, S. C.; *Taylor v. Hawkins*, 16 Q. B. 308; *Gilpin v. Fowler*, 9 Ex. R. 615; *Somerville v. Hawkins*, 10 Com. B. 583; *Harris v. Thompson*, 13 Com. B. 333; *R. v. Wallace*, 3 Ir. Law R., N. S. 38; *Bromage v. Prosser*, 4 B. & C. 247; 6 D. & R. 296, S. C. In this last case, which was an action for words spoken of the plaintiffs in their business as bankers, the law of implied or legal malice, as distinguished from malice in fact, was clearly expounded by Bayley J., in the following terms:—“Malice, in the common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. \* \* If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I mean to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact, and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. This is so laid down in *Sty. 392*, and was adjudged upon error in *Mercer v. Sparkes*, *Owen*, 51; *Noy*, 35. The objection there was, that the words were not charged to have been spoken maliciously, but the court answered, that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmondson v. Stevenson*, B. N. P. 8, Ld. Mansfield takes the distinction between these and ordinary actions of slander.” In an action for an alleged libel contained in an answer to inquiries respecting the character of a servant, the jury may find express malice from the simple fact, that the answer complained of was untrue to the defendant's knowledge; *Fountain v. Boodle*, 3 Q. B. 5.

<sup>2</sup> Note b to *Hodgson v. Scarlett*, 1 B. & A. 245, 246; approved of by *Alderson*, B., in *Gibbs v. Pike*, 9 M. & W. 358.



which the plaintiff is bound to rebut by proving the absence of all reasonable and probable cause,<sup>1</sup> and the presence of an actual malicious intent.<sup>2</sup>

§ 119. Some presumptions with respect to the ownership of property may conveniently here be noticed. And first, as to the boundaries of property.<sup>3</sup> Where two counties or parishes are separated by a non-tidal river, the mid-stream is the presumptive boundary between them.<sup>4</sup> Again, the owner of a several fishery, when the terms of the grant are unknown, is presumed to be the owner of the soil.<sup>5</sup> The law, too, presumes that the soil of un-navigable rivers, usque ad medium filum aquæ, together with the right of fishing,—but not the right of abridging the width, or interfering with the course, of the stream,<sup>6</sup>—belongs to the owner of the adjacent land;<sup>7</sup> while, in navigable rivers and arms of the sea, the soil *prima facie* is vested in the Crown, and the fishery *prima facie* is public.<sup>8</sup> These presumptions as to riparian ownership in streams, do not apply to great non-tidal inland lakes, whether

<sup>1</sup> *Abrath v. North East Ry. Co.*, 15 Cox, 354, S. C.; 52 L. J., Q. B. 620; and L. R., 11 Q. B. D. 440, per Ct. of App., overruling S. C. 52 L. J., Q. B. 352; and L. R., 11 Q. B. D. 79.

<sup>2</sup> *Mitchell v. Jenkins*, 5 B. & Ad. 568; *Porter v. Weston*, 5 Bing. N. C. 715; *Johnstone v. Sutton*, 1 T. R. 545. The jury may, but are not bound, to infer malice in fact from the want of probable cause. *Id.*

<sup>3</sup> As to boundaries of counties, &c., in Ireland, see 35 & 36 V., c. 48, §§ 2, 3, 4, cited post, § 1771.

<sup>4</sup> *Bridgwater Trust v. Bootle-cum-Linacre*, 2 Law Rep., Q. B. 4; 36 L. J., Q. B. 41; and 7 B. & S. 348, S. C.

<sup>5</sup> *R. v. Landulph*, 1 M. & Rob. 393, per Patteson, J.; *M'Cannon v. Sinclair*, 2 E. & E. 53; *R. v. Strand Board of Works*, 4 B. & S. 526; 33 L. J., M. C. 33, S. C.

<sup>6</sup> *D. of Somerset v. Fogwell*, 5 B. & C. 875; 1 D. & R. 747, S. C.; *Holford v. Bailey*, 8 Q. B. 1000; 13 Q. B. 427, S. C. in error; *Marshall v. The Ulleswater St. Navig. Co.*, 32 L. J., Q. B. 139; 3 B. & S. 732, S. C. But see some very able observations, contra, made by Cockburn, C. J., in S. C., 32 L. J., Q. B. 144, 145; and 3 B. & S. 747—749; also, *Bloomfield v. Wharton*, 1 R. 8 C. L. 68, cited in next note but one.

<sup>7</sup> *Bickett v. Morris*, 1 Law Rep., H. L., Sc. 47.

<sup>8</sup> *Carter v. Murcott*, 4 Burr. 2163; *Wishart v. Wyllie*, 1 Macq. Sc. Cas., H. of L. 389; *Lord v. Commis. for City of Sydney*, 12 Moo. P. C. R. 473; *Crosley v. Lightowler*, 3 Law Rep., Eq. 279; 2 Law Rep., Ch. App. 478; and 36 L. J., Ch. 584, S. C.; *Dwyer v. Rich*, 1 R. 6 C. L. 144.

<sup>9</sup> *Carter v. Murcott*, 4 Burr. 2163; *Malcomson v. O'Dea*, 10 H. of L. Cas. 563.

they be navigable or not;<sup>1</sup> but somewhat similar presumptions are recognised in respect of land lying on the sea shore; for that which is covered by the ordinary high water,—or to speak more accurately, by the medium high tide between the spring and the neap,<sup>2</sup>—is presumed *prima facie* to be the property of the Crown, though by grant or prescription it may belong to the lord of the manor, or to any other subject;<sup>3</sup> while, on the other hand, that part of the shore which is overflowed only at spring tide, is presumed to be vested in the proprietor of the adjoining lands.<sup>4</sup> So, land between high and low water mark, though forming a part of the body of the adjoining county,<sup>5</sup> is *prima facie* presumed to be extra-parochial;<sup>6</sup> and this presumption applies to an estuary or arm of the sea,<sup>7</sup> and also to the shore of a tidal river, as well as to the main sea-shore.<sup>8</sup> Again, waste land on the sides, and the soil to the middle, of a highway, are, in the absence of evidence to the contrary, presumed to belong to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder.<sup>9</sup> This rule, being founded on a supposition that the proprietor of the adjoining land, at some former period, gave up to the public for passage all the land between his inclosure and the middle of the road,<sup>10</sup> is liable to be rebutted by showing that the road has never

<sup>1</sup> *Bloomfield v. Wharton*, 1 R. 8 C. L. 68; *Bristow v. Cormican*, 3 App. Cas. 641, 667, per H. L. (I.).

<sup>2</sup> *Att.-Gen. v. Chambers*, 23 L. J., Ch. 662; 4 De Gex, M. & G. 206, S. C.

<sup>3</sup> *Blundell v. Catterall*, 5 B. & A. 293, 298, per Holroyd, J.; and 304, per Bayley, J.; *Lopez v. Andrew*, 3 M. & R. 329 a; *Calmaday v. Rowe*, 6 Com. B. 861, 878, 879. See post, §§ 130, 131.

<sup>4</sup> *Lowe v. Govett*, 3 B. & Ad. 863.

<sup>5</sup> *Embleton v. Brown*, 3 E. & E. 234.

<sup>6</sup> *R. v. Musson*, 27 L. J., M. C. 100; 8 E. & B. 900, S. C.; *Waterloo Bridge Co. v. Cull*, 28 L. J., Q. B. 75, per Ld. Campbell.

<sup>7</sup> *Ipswich Dock Commiss. v. St. Peter, Ipswich*, 7 B. & S. 310.

<sup>8</sup> *Bridgewater Trust v. Bootle-cum-Linacre*, 2 Law Rep., Q. B. 4; 36 L. J., Q. B. 41; and 7 B. & S. 348, S. C.

<sup>9</sup> *Doe v. Pearsey*, 7 B. & C. 304; 9 D. & R. 908, S. C.; *Steel v. Prickett*, 2 Stark. R. 463, per Abbott, C. J.; *Cooke v. Green*, 11 Price, 736; *Scoones v. Morrell*, 1 Beav. 251; *M. of Salisbury v. Gt. North. Rail. Co.*, 5 Com. B., N. S. 174; *Simpson v. Dendy*, 8 Com. B., N. S. 433; *Berridge v. Ward*, 30 L. J., C. P. 218; 10 Com. B., N. S. 400, S. C.; *R. v. Strand Board of Works*, 33 L. J., M. C. 33; 4 B. & S. 526, S. C. See *Gery v. Redman*, L. R. 1 Q. B. D. 161; 45 L. J., Q. B. 267, S. C.

<sup>10</sup> *Doe v. Pearsey*, 7 B. & C. 306, per Bayley, J.

in fact been dedicated to the public at all,<sup>1</sup> or that it was originally dedicated by some other party;<sup>2</sup> and the presumption may also be repelled by proof that the lord of the manor, or even that a stranger, has exercised acts of ownership, either over the spot in dispute, or over other waste land in immediate connexion with it.<sup>3</sup> The presumption just referred to as prevailing in the case of a public highway, will also be recognised in the case of a private occupation road running between two properties; and, in the absence of all evidence of acts of ownership, the soil of the road will be deemed to belong to the owners of the adjoining lands in equal moieties; that is, each owner will be presumed to be the proprietor of the soil *usque ad medium filum viæ*.<sup>4</sup> The mere fact that the owner of a field has a private right of way over a lane leading only to that field, affords no presumption that the soil of the lane is vested in him.<sup>5</sup> As to roads set out under the first general Inclosure Act, "the herbage and grass arising therefrom" are conclusively presumed to belong to the proprietors of the adjoining lands;<sup>6</sup> and as to those made under the later Act of William the Fourth, the commissioners are directed to award "the grass and herbage growing and renewing upon" them to such persons as in their judgment are best entitled to the same.<sup>7</sup> But both Acts are silent respecting the ownership of the soil, and it seems that as to that, no legal presumption can arise in favour of the proprietors of the neighbouring allotments.<sup>8</sup>

§ 120. Where fields belonging to different owners are separated by a hedge and ditch, the hedge *prima facie* belongs to the owner of the field in which the ditch is not; but if there are two ditches, one

§ 105

<sup>1</sup> Leigh v. Jack, 49 L. J., Ex. 220, per Ct. of App.; L. R., 5 Ex. D. 264, S. C.

<sup>2</sup> Headlam v. Headley, Holt, N. P. R. 463, per Bayley, J.

<sup>3</sup> Doe v. Kemp, 2 Bing. N. C. 102; 2 Scott, 9, S. C.; Grose v. West, 7 Taunt. 39; Anon., Lofft, 358; Doe v. Kemp, 7 Bing. 332; 5 M. & P. 173, S. C.; Doe v. Hampson, 4 Com. B. 267; Beckett v. Corp. of Leeds, 7 Law Rep., Ch. Ap. 421.

<sup>4</sup> Holmes v. Bellingham, 29 L. J., C. P. 132; 7 Com. B., N. S. 329, S. C.

<sup>5</sup> Smith v. Howden, 2 New R. 30; 14 C. B., N. S. 398, S. C.

<sup>6</sup> 41 G. 3, c. 109, § 11.

<sup>7</sup> 6 & 7 W. 4, c. 115, § 29.

<sup>8</sup> R. v. Hatfield, 4 A. & E. 164, per Ld. Denman; R. v. Edmonton, 1 M. & Rob. 32, per Ld. Tenterden.

on each side, the ownership of the hedge must depend upon evidence of acts of ownership.<sup>1</sup> The common user of a wall separating lands or houses which belong to different proprietors, is *prima facie* evidence that the wall, and the land on which it stands, belong to them in equal moieties as tenants in common.<sup>2</sup> But this presumption may be rebutted by showing that the wall in fact stands on land, parts of which were separately contributed by each proprietor.<sup>3</sup> Where a tree grows on the boundary of two fields, so that the roots extend into the soil of each, the property in the tree is presumed to belong to the owner of that land in which it was first sown or planted.<sup>4</sup> In the work of Mr. Callis on Sewers,<sup>5</sup> a distinction is drawn between a bank and a wall; the former, being made of *earth* taken from the adjacent soil, is presumed to belong to the party whose land adjoins thereto; the latter, being built of materials brought from a distance, is *prima facie* the property of the person who is bound to repair it. This distinction has been recognised in one case by the Court.<sup>6</sup>

§ 121. When the surface of land and the subjacent minerals are vested in different owners without any deeds<sup>7</sup> appearing to regulate their respective rights, the law presumes that the owner of the surface has a right to the *support* of the minerals.<sup>8</sup> So, when a

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<sup>1</sup> *Guy v. West*, 2 Sel. N. P. 1296, per Bayley, J. In France, boundary hedges and the trees in them are declared to be common property, "*mitoyens*," except in certain cases; Code Civ., Art. 670, 673.

<sup>2</sup> *Cubitt v. Porter*, 8 B. & C. 257; 2 M. & R. 267, S. C.; *Wiltshire v. Sidford*, 1 M. & R. 404; 8 B. & C. 259 n., S. C.; *Watson v. Gray*, L. R., 14 Ch. D. 492 per Fry, J.; 49 L. J., Ch. 243, S. C.

<sup>3</sup> *Matts v. Hawkins*, 5 Taunt. 20; *Murly v. M'Dermott*, 8 A. & E. 138; 3 N. & P. 256, S. C.

<sup>4</sup> *Holder v. Coates*, M. & M. 112, per Little Dale, J.; *Masters v. Pollie*, 2 Roll. R. 141; *contra*, *Waterman v. Soper*, 1 Ld. Ray. 737; *Anon.*, 2 Roll. R. 255.

<sup>5</sup> P. 74, 4th Ed.

<sup>6</sup> *D. of Newcastle v. Clark*, 8 Taunt. 627, 628, per Park, J.

<sup>7</sup> Where such deeds exist, see *Aspden v. Seddon*, 44 L. J., Ch. 359, per Ld. Js.; 10 Law Rep., Ch. Ap. 394, S. C.; *Davis v. Treharne*, 50 L. J., Ch. 665 per Dom. Proc.

<sup>8</sup> *Humphries v. Brogden*, 12 Q. B. 739, 746; *Smart v. Morton*, 5 E. & B. 30; *Harris v. Ryding*, 5 M. & W. 60; *Roberts v. Haines*, 25 L. J., Q. B. 353; 6 E. & B. 643, S. C.; *aff. in Ex. Ch.*, *Haines v. Roberts*, 7 E. & B. 625; *Rowbotham v. Wilson*, 6 E. & B. 593; 27 L. J., Q. B. 61, and 8 E. & B. 123, S. C. in Ex. Ch.: 8 H. of L. Cas. 348, and 30 L. J., Q. B. 49, S. C., in

house is divided into different flats, the proprietor of the upper story has a presumptive legal right, without any express grant, or enjoyment for any given time, to the support of the lower story, and the owner of the lower story is also entitled to the protection afforded by the upper rooms as a roof or covering for his dwelling.<sup>1</sup> On a similar principle it has long been held that, when two adjoining closes, or, it may be, two ancient buildings,<sup>2</sup> belong respectively to different persons, the owner of the one has a limited right<sup>3</sup> to the *lateral support* of the other;<sup>4</sup> and although this doctrine does not extend to a case where, by the erection of modern buildings, an additional weight has been put upon the land,<sup>5</sup> yet the law will presume the grant of an easement entitling the grantor to have his house supported by the soil of his neighbour's property, if the house has been built for more than twenty years,<sup>6</sup> and the ease-

Dom. Proc.; *Caledonian Ry. Co. v. Sprot*, 2 Macq. Sc. Cas. H. of L. 449. See *Elliot v. The N.-East Ry. Co.*, 32 L. J., Ch. 402, per Dom. Proc.; 10 H. of L. Cas. 333, S. C.; *Brown v. Robins*, 4 H. & N. 186; *Fletcher v. Gt. W. Ry. Co.*, 4 H. & N. 242; 29 L. J., Ex. 253, S. C. in Ex. Ch.; *Gt. W. Ry. Co. v. Bennett*, 36 L. J., Q. B. 133, per Dom. Proc.; 2 Law Rep., H. L. 27, S. C.; *Pountney v. Clayton, L. R.*, 11 Q. B. D. 820, per Ct. of App.; *Jeffries v. Williams*, 5 Ex. R. 792; *Rogers v. Taylor*, 2 H. & N. 828; 27 L. J., Ex. 173, S. C.; *Eadon v. Jeffcock*, 7 Law Rep., Ex. 379; 42 L. J., Ex. 36, S. C.; *Hext v. Gill*, 7 Law Rep., Ch. Ap. 699; *Dugdale v. Robertson*, 3 Kay & J. 695; *Bonomi v. Backhouse*, 27 L. J., Q. B. 378; 1 E. B. & E. 622, 654, S. C., in which last case it was held, that this right was an ordinary right of property incidental to all land, and was not a right founded on any presumption of a grant or an easement. See S. C. in Dom. Proc., nom. *Backhouse v. Bonomi*, 9 H. of L. Cas. 503. Also, *Wakefield v. D. of Buccleuch*, 4 Law Rep., Eq. 613, per Malins, V.-C., in a very elaborate judgment; 36 L. J., Ch. 763, S. C.; also, *May of Birmingham v. Allen*, 46 L. J., Ch. 673, per Ct. of App.; *L. R.*, 6 Ch. D. 284, S. C.; *Lamb v. Walker, L. R.*, 3 Q. B. D. 389; 47 L. J., Q. B. 451, S. C.; *Dixon v. White, L. R.*, 8 App. Cas. 833, per Dom. Pr. (Sc.). See, also, *Mitchell v. Darley Main Coll. Co.*, 53 L. J., Q. B. 470, where *Lamb v. Walker*, cited above, was overruled by Court of App., which held that every fresh subsidence in a worked-out mine gave rise to a fresh cause of action.

<sup>1</sup> *Humphries v. Brogden*, 12 Q. B. 747, 756, 757; *Caledonian Ry. Co. v. Sprot*, 2 Macq. Sc. Cas., H. of L. 449.

<sup>2</sup> *Lemaître v. Davis, L. R.*, 19 Ch. D. 281, per Hall, V.-C.; 51 L. J., Ch. 173, S. C.

<sup>3</sup> See *Smith v. Thackeray*, 1 Law Rep., C. P. 564; 1 H. & R. 615, S. C.; and *Siddons v. Short, L. R.*, 2 C. P. D. 572; 46 L. J., C. P. 795, S. C.

<sup>4</sup> 2 Roll. Abr. 564, *Trespass*, I., pl. 1, cited in 12 Q. B. 743.

<sup>5</sup> *Murchie v. Black*, 34 L. J., C. P. 337.

<sup>6</sup> *Wyatt v. Harrison*, 3 B. & Ad. 871; *Hide v. Thornborough*, 2 C. & Kir. 250; *Partridge v. Scott*, 3 M. & W. 220, all of which cases are commented on in *Humphries v. Brogden*, 12 Q. B. 748—750. See *Hunt v. Peake*, 1 V. Johns. 705; *Jeffries v. Williams*, 5 Ex. R. 792; *Rogers v. Taylor*, 2 H. & N. 828; 27 L. J., Ex. 173, S. C.

ment has been enjoyed peaceably, openly, and without any attempt at deception or concealment.<sup>1</sup> So, where a landowner has built two or more houses adjoining each other, so as to require mutual support, or mutual drainage, and has afterwards parted with his interest in the several houses to different persons, the law will, in general,<sup>2</sup> presume either a grant or reservation, that will entitle each owner to have his house supported by,<sup>3</sup> or drained through,<sup>4</sup> the adjoining buildings. Where, however, a dock and a wharf had belonged to the same owner, and the bowsprits of vessels in the dock had for many years projected over a part of the wharf, the court held, that, in a subsequent grant of the wharf, the law would not imply, in favour of the vendor, a reservation of the right for the bowsprits to project over the wharf as before.<sup>5</sup>

§ 122. The law also presumes *prima facie* that the lord of a manor is entitled to all *waste* lands within the manor; and therefore it is not essentially necessary that he should show acts of ownership upon them.<sup>6</sup> So, the lord,—who, by virtue of his ownership of the soil, is entitled to take gravel, marl, loam, or subsoil in the waste either for his private use or for sale, so long as he does not infringe on the rights of the commoners,—will be presumed, in exercising this limited right, not to have exceeded his limited powers, unless the tenants can adduce some evidence to the con-

<sup>1</sup> *Dalton v. Angus*, L. R., 6 App. Cas. 740, per Dom. Proc.; 50 L. J., Q. B. 689, S. C.; aff. S. C., L. R., 4 Q. B. D. 162, per Ct. of App.; and 48 L. J., Q. B. 225; and overruling *Angus v. Dalton*, L. R., 3 Q. B. D. 85; and 47 L. J., Q. B. 163. See also *Bell v. Love*, L. R., 10 Q. B. D. 547; S. C. affd. in Dom. Proc., 53 L. J., Ch. 257, nom. *Love v. Bell*; and L. R. 9 App. Cas. 286.

<sup>2</sup> See *Murchie v. Black*, 34 L. J., C. P. 337.

<sup>3</sup> *Richards v. Rose*, 9 Ex. R. 218. See *Solomon v. Vintners' Co.*, 4 H. & N. 585, and *Kempston v. Butler*, 12 Ir. Law R., N. S. 516.

<sup>4</sup> *Pyer v. Carter*, 26 L. J., Ex. 258; 1 H. & N. 916, S. C.; *Hall v. Lund*, 32 L. J., Ex. 113. The authority of *Pyer v. Carter* has been denied by *Ld. Westbury*, Ch., in *Suffield v. Brown*, 3 New R. 343, 344; 33 L. J., Ch. 259, 260; 4 De Gex, J. & S. 185, S. C. See *Pearson v. Spencer*, 3 B. & S. 761; *Wheeldon v. Burrows*, L. R., 12 Ch. D. 31, per Ct. of App.; 48 L. J., Ch. 853, S. C.; *Polden v. Bastard*, 4 B. & S. 258; 35 L. J., Q. B. 92, S. C. in Ex. Ch.; and 1 Law Rep., Q. B. 156, S. C.; *Watts v. Kelson*, 40 L. J., Ch. 126; 6 Law Rep., Ch. Ap. 166, S. C.

<sup>5</sup> *Suffield v. Brown*, 3 New R. 340; 33 L. J., Ch. 249; 4 De Gex, J. & S. 185, S. C., per *Ld. Westbury*, Ch., reversing a decision of *Romilly*, M. R., 2 New R. 378.

<sup>6</sup> *Doe v. Williams*, 7 C. & P. 332, per *Coleridge*, J.

trary.<sup>1</sup> This rule is the more deserving of notice, because the presumption is against the lord in the case of approvement, apparently on the ground that, as he has made a grant over the whole waste, his right to inclose any portion of it must be conditional on his establishing that sufficient waste is left for the tenants to enjoy their rights of common.<sup>2</sup> It is now clearly established,—though the point was formerly much doubted,<sup>3</sup>—that when a tenant encroaches upon the waste contiguous to his farm and incloses it, he is to be presumed, in the absence of acts proving a contrary intention, to have thus acted for the benefit of his landlord.<sup>4</sup> This presumption will be recognised even though the lands inclosed be the property of a stranger;<sup>5</sup> but it will doubtless be much strengthened, if the landlord of the farm be also the lord of the waste.<sup>6</sup>

§ 123. As men generally own the property they possess, proof of possession is presumptive proof of ownership.<sup>7</sup> This presumption is recognised in the Factors' Acts,<sup>8</sup> in the Irish, Scotch, and English Acts relating to injuries done by dogs to sheep,<sup>9</sup> in the Pawnbrokers' Act, 1872, so far as relates to the holders of pawn-

<sup>1</sup> Hall v. Byron, L. R., 4 Ch. D. 667, 680, per Hall, V.-C.; 46 L. J., Ch. 297, S. C.

<sup>2</sup> Id.; Arlett v. Ellis, 7 B. & C. 346, 370, per Bayley, J.; Lascelles v. Ld. Onslow, 46 L. J., Q. B., 343, per Lush, J.; L. R., 2 Q. B. D. 433, 450, S. C.

<sup>3</sup> Doe v. Mulliner, 1 Esp. 460, per Ld. Kenyon; Doe v. Davies, id. 461.

<sup>4</sup> Doe v. Jones, 15 M. & W. 590; Andrews v. Hailes, 2 E. & B. 349; Kingsmill v. Millard, 11 Ex. R. 313; Ld. Lisburne v. Davies, 1 Law Rep., C. P. 259; 1 H. & R. 172, S. C.; 35 L. J., C. P. 193, S. C.; Doe v. Massey, 17 Q. B. 373; Doe v. Williams, 7 C. & P. 332; Doe v. Murrell, 8 C. & P. 134, per Ld. Abinger; Doe v. Rees, 6 C. & P. 610, per Parke, B.; Doe v. Tidbury, 14 Com. B. 304; Whitmore v. Humphries, 7 Law Rep., C. P. 1; 41 L. J., C. P. 43, S. C.; Att.-Gen. v. Tomline, L. R., 5 Ch. D. 750; 46 L. J., Ch. 654, S. C.; and S. C. on App., L. R., 15 Ch. D. 150.

<sup>5</sup> Cases cited in last note.

<sup>6</sup> Bryan v. Winwood, 1 Taunt. 208.

<sup>7</sup> Webb v. Fox, 7 T. R. 397, per L. Kenyon.

<sup>8</sup> 6 G. 4, c. 94; 5 & 6 V., c. 39, § 1; 40 & 41 V., c. 39. See Heyman v. Flewker, 13 Com. B., N. S. 519; Baines v. Swainson, 4 B. & S. 270; Fuentes v. Montis, 4 Law Rep., C. P. 93, per Ex. Ch.; 38 L. J., C. P. 95, S. C.; Vickers v. Hertz, 2 Law Rep., H. L. Sc. 113; Johnson v. Credit Lyonnais Co., L. R., 3 C. P. D. 32, per Ch. of App.; 47 L. J., C. P. 241, S. C.

<sup>9</sup> 25 & 26 V., c. 59, § 2, Ir., enacts, that "the occupier of any house or premises where any dog was kept, or permitted to live or remain, at the time of such injury complained of, shall be deemed to be the owner of such dog, unless the contrary be proved." See, also, 28 & 29 V., c. 50, § 7, Ir.; 26 & 27 V., c. 100, § 2, Sc.; and 28 & 29 V., c. 60, § 2.

tickets,<sup>1</sup> and also in most of the statutes which authorise the compulsory sale of lands for particular purposes; as, for instance, in the Lands' Clauses Consolidation Act.<sup>2</sup> At common law, too, it may be illustrated by a great variety of cases. Thus, in an action on a policy of insurance effected on a ship and her cargo, the plaintiff may rely on the mere fact of possession, without the aid of any documentary proof or title deeds, unless such further proof be rendered necessary by the opposite party adducing some contrary evidence.<sup>3</sup> This rule applies both to real and personal property, and, in the former case, raises a presumption of a seisin in fee.<sup>4</sup> In actions of trespass to real property, the presumption arising from the simple fact of possession amounts, as against a mere wrongdoer, to *conclusive* evidence;<sup>5</sup> and if an action be brought for an injury done to the reversion of an estate, proof of the receipt of rent<sup>6</sup> by the plaintiff will, unless the sum annually received be so small as to raise a presumption that it is a mere quit rent,<sup>7</sup> be sufficient evidence of his title to the reversion as against all the world, except the real owner and persons claiming under him.<sup>8</sup> So, also, in actions against wrong-doers for injuries to *personal* chattels, proof of possession, when coupled with evidence that the plaintiff has some special property in such chattels, has long been held to constitute a complete title.<sup>9</sup> Therefore, an undischarged bankrupt may probably still, as under the old law,<sup>10</sup> sue in trover a wrong-

<sup>1</sup> 35 & 36 V., c. 93, § 25.

<sup>2</sup> 8 & 9 V., c. 18, § 79.

<sup>3</sup> *Robertson v. French*, 4 East, 130, 137; *Sutton v. Buck*, 2 Taunt. 302. So, proof that the plaintiff has ordered and paid for stores for the ship, is *prima facie* evidence of his ownership, so as to enable him to sustain an action on a policy against the underwriter; *Thomas v. Foyle*, 5 Esp. 88, per Ld. Ellenborough.

<sup>4</sup> *Doe v. Coulthred*, 7 A. & E. 239, per Ld. Denman; *Jayne v. Price*, 5 Taunt. 326; *Doe v. Penfold*, 8 C. & P. 537, per Patteson, J. See *Metters v. Brown*, 32 L. J., Ex. 138; 1 H. & C. 686, 8 C.; as to how this presumption can be rebutted.

<sup>5</sup> *Elliott v. Kemp*, 7 M. & W. 312, per Parke, B.

<sup>6</sup> See, also, 23 & 24 V., c. 154, § 24, Ir., which makes the receipt of rent, under certain circumstances, for a certain period, *prima facie* evidence of a landlord's derivative title.

<sup>7</sup> *Doe v. Johnson*, Gow, R. 173, per Holroyd, J., recognised in *Reynolds v. Reynolds*, 12 Ir. Eq. R. 172, 181.

<sup>8</sup> *Daintry v. Brocklehurst*, 3 Ex. R. 207.

<sup>9</sup> *Elliott v. Kemp*, 7 M. & W. 312, per Parke, B.

<sup>10</sup> *Webb v. Fox*, 7 T. R. 391; *Drayton v. Dale*, 2 B. & C. 293; 3 D. & R. 534, 8 C.; *Fyson v. Chambers*, 9 M. & W. 460.



doer who has taken goods out of his custody ; for although the trustee may take possession of his after acquired property, yet if he allows the bankrupt to treat such property as his own, no third person can cover his own default by setting up a title, upon which the trustee himself does not think fit to insist. So, possession of a ship under a transfer from the rightful owner, which is void for non-compliance with the register Acts, constitutes a sufficient title in the plaintiff to support an action of trover against a stranger, for converting a part of the ship which was wrecked.<sup>1</sup> So, even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner.<sup>2</sup> In Ireland, too, a mere naked possession will entitle a party to maintain trover as against a wrong-doer,<sup>3</sup> and the same doctrine has been acted upon in the English Courts.<sup>4</sup>

§ 124. Many cases also show, that an apparent stranger to a document may be so far connected with it by the fact of producing it, as to make it ample *prima facie* evidence for a jury in support of his claim.<sup>5</sup> Thus, the production by a plaintiff of an I O U signed by the defendant, though not addressed to any one by name, is, in general,<sup>6</sup> abundant evidence, not indeed of money lent, of which it furnishes no proof whatever,<sup>7</sup> but of an account stated between the parties.<sup>8</sup> So, if a letter be given in evidence with the direction torn off, the jury will do well to presume, *prima facie*, that it was addressed to the party who produces it.<sup>9</sup>

<sup>1</sup> *Sutton v. Buck*, 2 Taunt. 302.

<sup>2</sup> *Per* Chambre, J., *id.* 309.

<sup>3</sup> *Fitzpatrick v. Dunphy*, 1 Ir. Law Rep., N. S. 366, *per Ex.*

<sup>4</sup> *Jeffries v. Gt. West. Rail. Co.*, 5 E. & B. 802. This case resolves a doubt raised by *Parke, B.*, in *Fyson v. Chambers*, 9 M. & W. 467. See, also, *Armory v. Delamirie*, 1 Str. 505 ; 1 Smith, L. C. 301, S. C. ; *Sutton v. Buck*, 2 Taunt. 309, *per Lawrence, J.*

<sup>5</sup> *Fesenmayer v. Adcock*, 16 M. & W. 449, *per Pollock, C. B.*

<sup>6</sup> But it will not furnish evidence of an account stated, if the defendant can show that, in fact, it was not given in acknowledgment of a debt due. *Lemere v. Elliott*, 30 L. J., Ex. 350 ; 6 H. & N. 656, S. C.

<sup>7</sup> *Fesenmayer v. Adcock*, 16 M. & W. 449, questioning *Douglas v. Holme*, 12 A. & E. 641.

<sup>8</sup> *Id.* ; *Curtis v. Rickards*, 1 M. & Gr. 46 ; *Croker v. Walsh*, 2 Ir. Law R., N. S. 552. See *Wilson v. Wilson*, 14 Com. B. 616, 626.

<sup>9</sup> *Curtis v. Rickards*, 1 M. & Gr. 47, *per Tindal, C. J.*

§ 125. In actions for the recovery of land, though it is an inflexible rule that the plaintiff must solely rely on the strength of his own legal title, yet proof of a prior possession, however short, will be *prima facie* evidence of title as against a wrong-doer.<sup>1</sup> Thus, where a party received a key of a room from the lessor of the plaintiff, and held the premises for about a year, when the defendant broke in at night and took forcible possession, Lord Tenterden held that the plaintiff was not entitled to recover.<sup>2</sup> In another case of ejectment, where the lessor of the plaintiff proved that he had formerly held the premises for twenty-three years, and during that time had received and increased the rent, the court held that the defendant could not rebut the presumption of a seisin in fee arising from these unequivocal acts of ownership, by showing that he himself had subsequently been in possession for a period less than twenty years, for presumption being thus met by presumption, the defendant was bound to establish, if he could, a title of a higher description.<sup>3</sup> In some cases it will be presumed, that the fee-simple of the land carries with it the right to the minerals;<sup>4</sup> but this presumption is not universal, since in mining districts the right to the minerals and the fee-simple of the soil are frequently in different persons; and it may at all times be rebutted by showing, either an absence of enjoyment of the minerals by the owner of the soil, or an actual user of the minerals by a stranger.<sup>5</sup> The law also presumes *prima facie*, that the tenant of the surface is tenant of the subjacent strata, but this presumption, like the last, is liable to be defeated, by proof that the surface and the subsoil have been dissevered in title, and have become separate tenements.<sup>6</sup>

<sup>1</sup> *Asher v. Whitelock*, 35 L. J., Q. B. 17; 1 Law Rep., Q. B. 1, S. C.

<sup>2</sup> *Doe v. Dyeball*, 3 C. & P. 610; M. & M. 346, S. C. See *Doe v. Barnard*, 13 Q. B. 945.

<sup>3</sup> *Doe v. Cooke*, 7 Bing. 346; 5 M. & P. 181, S. C. See, also, *Breast v. Lever*, 7 M. & W. 593.

<sup>4</sup> But see the Transfer of Land Act, 1862, 25 & 26 V., c. 53, § 9, and the Land Transfer Act, 1875, 38 & 39 V., c. 87, § 18, both of which statutes, for purposes of registration of title, recognise an opposite presumption, unless, in the description of the land, mines or minerals be expressly mentioned.

<sup>5</sup> *Rowe v. Grenfel*, Ry. & M. 396, per Ld. Tenterden; *Rowe v. Brenton*, 8 B. & C. 737; *Hodgkinson v. Fletcher*, 3 Doug. 31.

<sup>6</sup> *Keyse v. Powell*, 2 E. & B. 132; *Smith v. Lloyd*, 9 Ex. 562, 574, per Parke, B.

§ 126. The presumption of title arising from possession will be § 111  
 obviously much strengthened by proof of uninterrupted enjoyment  
 for a considerable time. In many cases, as before observed,<sup>1</sup> the  
 legislature has fixed what periods of undisturbed possession will  
 suffice to confer an absolute title; and in these cases, when the  
 party by his pleading shows that he relies upon the statutory limita-  
 tion, no lapse of time but that of the full period fixed by Act of  
 Parliament will justify a presumption in support of the claim.<sup>2</sup>  
 But if, instead of depending upon the statute-law, the party rests  
 his case, as he may do, upon common-law presumption, or a lost  
 grant, the fact of enjoyment for a less period than the statutory  
 number of years, when coupled with *other circumstances*, will  
 warrant a jury in finding a verdict in his favour.<sup>3</sup>

§ 127. In other cases, to which the statutes of limitation do not § 112  
 extend, the same principles of presumptive evidence apply, though  
 they are necessarily open to a more vague interpretation. For in-  
 stance, though a plaintiff seeking to recover land is bound, as we  
 have just seen,<sup>4</sup> to establish his own title, he will not be required  
 to prove strictly every successive link in it, provided that the  
 property has been long in his possession. When, therefore, a man  
 claimed under a feoffment, and proved that he had had uninterrupted  
 enjoyment of the premises for twenty years, the court and jury  
 presumed, in his favour, that the necessary formalities of the old  
 livery of seisin had been complied with.<sup>5</sup> But presumptions of this  
 nature will not now be raised, where the land has been held for a  
 less period than twelve years,<sup>6</sup> nor will they, where the acts of the  
 parties, or the other facts in the case, lead to a different inference.<sup>7</sup>

<sup>1</sup> Ante, § 74.

<sup>2</sup> See 2 & 3 W. 4, c. 71, § 6; 2 & 3 W. 4, c. 100, § 8, *Eldridge v. Knott*,  
 1 Cowp. 214; *Lowe v. Carpenter*, 6 Ex. R. 825.

<sup>3</sup> See *Bright v. Walker*, 1 C. M. & R. 222, 223, per Parke, B.; *Ld. Stam-*  
*ford v. Dunbar*, 13 M. & W. 822, 827; *Lowe v. Carpenter*, 6 Ex. R. 830, 831,  
 per Parke, B.; *Hanmer v. Chance*, 4 De Gex, J. & S. 626, 631, per *Ld. West-*  
*bury*.

<sup>4</sup> Ante, § 125.

<sup>5</sup> *Rees v. Lloyd*, Wightw. 123; *Doe v. Cleveland*, 9 B. & C. 864; 4 M. &  
 R. 666, S. C., *Doe v. Davies*, 2 M. & W. 503; *Doe v. Gardiner*, 12 Com. B.  
 319.

<sup>6</sup> 37 & 38 V., c. 57, § 12; and see cases in last note.

<sup>7</sup> *Doe v. Gardiner*, 12 Com. B. 319.

Again, without any direct proof of the passing of a bye-law, or the loss of it, the court will infer its existence from a usage of long standing; for where rights have been exercised in a particular manner for many years without interruption, it is only reasonable to presume that they have had a legal origin.<sup>1</sup>

§ 128. The maxim, "*ex diuturnitate temporis omnia præsumuntur rite et solemniter esse acta;*" is of great value, and has been applied to a variety of cases. Under certain circumstances this presumption assumes a conclusive character. One instance has already been furnished<sup>2</sup> in the case of ancient documents, the due execution of which will be presumed on their mere production. The American courts recognise other applications of the rule. Thus, after<sup>3</sup> the lapse of twenty years, they conclusively presume, in favour of every judicial tribunal which has acted within its jurisdiction, that all persons interested in its proceedings have had due notice.<sup>4</sup> So, it has been held in the United States, that where an authority is given by law to executors, guardians, and other officers, to make sales of lands upon being duly licensed by the courts, and they are required to advertise the sales in a particular manner, and to observe other formalities, the lapse of sufficient time, which in most cases is fixed at thirty years, raises a conclusive presumption that all the legal formalities of the sale were observed.<sup>5</sup> The licence to sell, and the official character of the vendor, being provable by record or judicial registration, must in general be so proved; and the deed must also be proved in the usual manner; it is only the intermediate proceedings that are presumed. *Probatīs extremis præsumuntur media.* § 113

<sup>1</sup> R. v. Powell, 3 E. & B. 377; May. of Hull v. Horner, 1 Cowp. 110, per Ld. Mansfield. See Johnson v. Barnes, 8 Law Rep., C. P. 527, per Ex. Ch.

<sup>2</sup> Ante, § 87.

<sup>3</sup> Gr. Ev. §§ 19 & 20, in great part.

<sup>4</sup> Brown v. Wood, 17 Mass. 68.

<sup>5</sup> See Pejepscot Prop's v. Ransom, 14 Mass. 145; Blossom v. Cannon, id. 177; Colman v. Anderson, 10 Mass. 105; Williams v. Eyton, 27 L. J., Ex. 178; 2 H. & N. 771, S. C.; 4 H. & N. 357, S. C., in Ex. Ch. In some cases, an interval of twenty years has been held sufficient. See Society, &c., v. Wheeler, 1 New Hamp. R. 310.

§ 129. In the Act which was passed in 1874, to facilitate the transfer of land,<sup>1</sup> the legislature has incorporated the maxim in question in one of the leading rules, which are henceforth to regulate the practice of conveyancers and the rights of vendors and purchasers. For § 2 enacts, in substance, that in the completion of any contract of sale of land, and subject to any stipulation to the contrary in the contract, all recitals, statements, and descriptions of facts, matters and parties, contained in deeds, instruments, Acts of Parliament or statutory declarations, twenty years old at the date of the contract, shall,—unless proved to be inaccurate,—be sufficient evidence of the truth of the same.<sup>2</sup>

§ 130. One of the most important applications of the presumption under review, is to cases where the rights of the Crown are concerned. Here,<sup>3</sup>—though lapse of time does not of itself furnish a conclusive legal bar to the title of the Sovereign, agreeably to the mischievous maxim *nullum tempus occurrit regi*,—yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted possession. Accordingly, royal grants, charters, and even Acts of Parliament, have not infrequently been thus found by the jury, after long continued peaceable enjoyment, accompanied by the usual acts of ownership.<sup>4</sup> So, the long enjoyment of port duties, tolls, customary dues, fees, or the like will, if the nature of the case admits of it,<sup>5</sup> be held to warrant the presumption of any

<sup>1</sup> 37 & 38 V., c. 78, § 2; *Bolton v. London School Board*, L. R., 7 Ch. D. 766; 47 L. J., Ch. 461, S. C.

<sup>2</sup> See *Re Marsh & Ld. Granville*, L. R., 24 Ch. D. 11, per Fry, J.

<sup>3</sup> Gr. Ev. § 45, in part, as to nine lines.

<sup>4</sup> *R. v. Brown*, cited 1 Cowp. 110; *May. of Hull v. Horner*, id. 102; *Eldridge v. Knott*, id. 215; *Lopez v. Andrew*, 3 M. & R. 329 a; *Delarue v. Church*, 2 L. J., Ch. 113; *O'Neill v. Allen*, 9 Ir. Law R., N. S. 132, 141, per Pigot, C. B.; *Doe d. Devine v. Wilson*, 10 Moo., P. C. L. 527; *Little v. Wingfield*, 11 Ir. Law R., N. S. 63; *Roe v. Ireland*, 11 East, 280; *Goodtitle v. Baldwin*, id. 488; *Att.-Gen. v. Ewelme Hospital*, 17 Beav. 366; *Mather v. Trinity Church*, 3 Serg. & R. 509.

<sup>5</sup> See *Gann v. Free Fishers of Whitstable*, 20 Com. B., N. S. 1, in Dom. Proc.; 11 H. of L. Cas. 192, S. C.; overruling S. C. in C. P. and Ex. Ch., *Free Fishers of Whitstable v. Gann*, and *Gann v. Johnson*, 11 Com. B., N. S. 387, and 13 Com. B., N. S. 859; *Bryant v. Foot*, 2 Law Rep., Q. B. 161; 7 B. & S. 725, S. C.; and in Ex. Ch., S. C. 3 Law Rep., Q. B. 497; 37 L. J., (3019)

fact necessary to make them legal :<sup>1</sup> and if distinct evidence of any such payments be given as far back as living memory goes, the jury, unless evidence to the contrary be shown, will be quite justified in presuming, or, rather, will be directed to presume, that such payments were immemorial, or at least were referable to a legal origin.<sup>2</sup> So, a series of acts of ownership exercised on the seashore by the adjoining proprietor, will afford abundant evidence for a jury to presume that the Crown formerly granted the soil to one of his ancestors;<sup>3</sup> and a similar inference may be drawn from the production of a royal grant conveying the right of wreck.<sup>4</sup>

§ 131. Again, notwithstanding the rule which provides that, in § 114 order to constitute a valid dedication to the public of a highway, the owner of the soil must intend to dedicate,<sup>5</sup> the uninterrupted user of a road by the public for forty or fifty years has been held amply sufficient to justify a presumption in favour of the original animus dedicandi, although there was ground for supposing that the soil of the highway was vested in the Crown.<sup>6</sup> Even a qualified or partial dedication of a way may be presumed in like manner from continuous use; and in a case in which, as far back as living memory went, the public had enjoyed a right of way across an arable field, and the owner had ploughed up the field including the

Q. B. 217, and 9 B. & S. 444; *Lawrence v. Hitch*, 3 Law Rep., Q. B. 521, in Ex. Ch.; 37 L. J., Q. B. 209; and 9 B. & S. 467, S. C. See, also, *Mills v. May*, of Colchester, 36 L. J., C. P. 216; 2 Law Rep., C. P. 476, S. C.; and *Free Fishers of Whitstable v. Foreman*, 2 Law Rep., C. P. 688, 716, 717; 37 L. J., C. P. 305, S. C. in Ex. Ch.; and S. C. in Dom. Proc. nom. *Foreman v. Free Fishers of Whitstable*, 38 L. J., C. P. 345.

<sup>1</sup> *May. of Exeter v. Warren*, 5 Q. B. 801, per Ld. Denman.

<sup>2</sup> *Malcomson v. O'Dea*, 10 H. of L. Cas. 593; *Mills v. May*, of Colchester, 36 L. J., C. P. 213; *D. of Beaufort v. Smith*, 19 L. J., Ex. 106; per Parke, B.; 4 Ex. R. 471, S. C.; *Pelham v. Pickersgill*, 1 T. R. 667, per Ashhurst, J.; *Shepherd v. Payne*, 3 New R. 580, per Ex. Ch.

<sup>3</sup> *Calmady v. Rowe*, 6 Com. B. 861; *D. of Beaufort v. May*, of Swansea, 3 Ex. R. 413; *Le Strange v. Rowe*, 4 Fost. & Fin. 1048, per Erle, C. J.; *Healy v. Thorne*, 1 R., 4 C. L. 495. See ante, § 119.

<sup>4</sup> *Hale de Jure Mar.* 25, recognised in *Calmady v. Rowe*, 6 Com. B. 891.

<sup>5</sup> *Pooler v. Huskinson*, 11 M. & W. 827.

<sup>6</sup> *R. v. East Mark*, 11 Q. B. 877; *R. v. Petrie*, 24 L. J., Q. B. 167; 4 E. & B. 737, S. C.; *Turner v. Walsh*, L. R., 6 App. Cas. 638. See *Greenwich Board of Works v. Maudslay* 5 Law Rep., Q. B. 397; 39 L. J., Q. B. 205, S. C.; *Powers v. Bathurst*, 49 L. J., Ch. 294, per Fry, J.

path, it was presumed, first, that the original dedication of the way was subject to the right of ploughing it up in due course of farming,<sup>1</sup> and next, that although it had for a time become impassable in consequence of such ploughing, the public had no right of deviating from it.<sup>2</sup> So,<sup>3</sup> after evidence of nearly forty years' possession of a tract of land, and proof of a prior order of council for its survey, and of an actual survey, an American jury has been instructed to presume that a patent had been duly issued.<sup>4</sup> In regard, however, to Crown and public grants, a longer period is generally deemed necessary, to justify this presumption, than in the case of grants from private persons.

§ 132. The principles upon which, in cases of incorporeal hereditaments, grants may be presumed, as between private persons, from mere uninterrupted user and enjoyment, have been much discussed in Ireland; and it seems now to be finally settled, first, that juries in such cases should not be required to find as a fact that a deed of grant has been *actually* executed, but that, without believing any grant to have been made, they may often, under the instruction of the court, presume its existence for the simple purpose of *quieting possession*,<sup>5</sup>—and next, that this presumption may be sometimes raised even against a reversioner, provided it can be either directly proved, or reasonably inferred, that he has had full knowledge of his opponent's actual enjoyment of the right in

§ 114A

<sup>1</sup> *Mercer v. Woodgate*, 10 B. & S. 833; 39 L. J., M. C. 21, S. C.; *Arnold v. Blaker*, 40 L. J., Q. B. 185, per Ex. Ch.

<sup>2</sup> *Arnold v. Holbrook*, 8 Law Rep., Q. B. 96; 42 L. J., Q. B. 81, S. C.

<sup>3</sup> Gr. Ev. § 45, in part.

<sup>4</sup> *Jackson v. M'Call*, 10 Johns. 377: "Si probet possessionem excedentem memoriam hominum, habet vim tituli et privilegii, etiam a Principe. Et hæc est differentia inter possessionem xxx vel xl annorum, et non memorabilis temporis; quia per illam acquiritur non directum, sed utile dominium; per istam autem directum." 1 Masc. de Prob., p. 239; concl. 199, n. 11, 12.

<sup>5</sup> *Deeble v. Linehan*, 12 Ir. Law R., N. S. 1, per Ex. Ch., following the dicta of Ld. Mansfield in *Eldridge v. Knott*, 1 Cowp. 214, and of Ld. Wensleydale in *Bright v. Walker*, 1 C. M. & R. 217, and in *Magdalen Coll. v. Att.-Gen.*, 3 Jur., N. S. 675, cor. Dom. Proc., and overruling a dictum of Bayley, B., in *Day v. Williams*, 2 C. & J. 461; *Little v. Wingfield*, 11 Ir. Law R., N. S. 63, per Ex. Ch.

question, and has tacitly assented thereto.<sup>1</sup> But still the presumption of a grant can only arise, when the person against whom the right is claimed might have interrupted or prevented the user relied on;<sup>2</sup> and, therefore, the grant of a right to the uninterrupted passage of air to a windmill from over the soil of a neighbour, cannot be presumed from an uninterrupted use of the mill for forty years.<sup>3</sup>

§ 133.<sup>4</sup> Juries are also sometimes advised, in more or less forcible terms, to presume conveyances of corporeal hereditaments between private individuals, in favour of the party who has proved a right to the beneficial ownership, and whose undisturbed possession, being consistent with the existence of the conveyance required to be presumed, affords reasonable ground for belief that the legal title has in fact been conveyed.<sup>5</sup> This presumption is made, in order to prevent an apparently just title from being defeated by mere formal matter;<sup>6</sup> but, to adopt the language of Chief Justice Tindal,<sup>7</sup> "no case can be put in which any presumption has been made, except when a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and *in such case only*, has it ever been allowed."

§ 134. Subject to these observations, the presumption in favour of a conveyance will, in general, be allowed to prevail, whenever it

<sup>1</sup> *Deeble v. Linehan*, 12 Ir. Law R., N. S. 1, per Ex. Ch.; *Winterbottom v. Ld. Derby*, 2 Law Rep., Ex. 316.

<sup>2</sup> *Chasemore v. Richards*, 7 H. of L. Cas. 349.

<sup>3</sup> *Webb v. Bird*, 13 Com. B., N. S. 841, per Ex. Ch.; *Bryant v. Lefever*, 48 L. J., C. P. 380, per Ct. of App.; L. R., 4 C. P. D. 172, S. C.

<sup>4</sup> Gr. Ev. § 46; in part.

<sup>5</sup> *Doe v. Cooke*, 6 Bing. 180, per Tindal, C. J. See *Doe v. Millett*, 11 Q. B. 1036, and cases there cited.

<sup>6</sup> *Doe v. Cooke*, 6 Bing. 180, per Tindal, C. J.; *Doe v. Sybourn*, 7 T. R. 3, per Ld. Kenyon.

<sup>7</sup> *Doe v. Cooke*, 6 Bing. 179. But see *Little v. Wingfield*, 11 Ir. Law R., N. S. 63, 73, 103, where the passage cited above is called in question as laying down the law too narrowly.



was the declared *duty* of trustees to convey to the beneficial owner at a specified time, as upon his attainment of the age of majority, or on the death of a cestui que vie, or after the payment of debts, legacies, portions, or the like; for in such cases it is reasonable to presume that the trustees have performed their duty, and done what a court of equity would compel them to do.<sup>1</sup> A like presumption will probably arise where the duty to convey, though not *expressly* declared, may *constructively* be gathered from the object of the trust; as, for instance, where an estate is vested in trustees for a temporary purpose, which has been attained, and no further intention is declared, or can reasonably be inferred, requiring the legal estate to remain outstanding.<sup>2</sup>

§ 135. It has been asserted, and probably with correctness, that this presumption will never be made *against* the owner of the inheritance, with the single exception of those cases where he has attempted to defeat the solemn acts of himself, or of those through whom he claims. Thus, if a mortgagor attempt to set up an outstanding fee as against a mortgagee for years, or the appointee of a devisee in fee dispute the former right of the devisor to grant a lease of the premises in question, on the ground that the legal estate was, at the time of the grant, outstanding in a trustee, the jury, in cases where the estoppel is not pleaded, may still presume a conveyance; for, in the first case,<sup>3</sup> the presumption will be made in favour of the honesty of the mortgagor at the time of the mortgage, though against his interest at the time of the trial; and in the second,<sup>4</sup> it will equally prevail, in order to give validity and effect to the grant of the devisor, which would otherwise be void.

<sup>1</sup> *England v. Slade*, 4 T. R. 682; *Doe v. Sybourn*, 7 T. R. 2; 2 Esp. 496, S. C.; *Wilson v. Allen*, 1 Jac. & W. 611, 620, per Sir T. Plumer; *Emery v. Grocock*, 6 Madd. 54, per Sir J. Leach. In *England v. Slade*, a conveyance from the trustees was presumed, though only *three years* had elapsed from the time when they ought to have conveyed.

<sup>2</sup> *Hillary v. Waller*, 12 Ves. 239, 252, per Sir W. Grant; *Doe v. Lloyd*, Pea. Ev. App. 41, per Lawrence, J. These cases tend to establish a doctrine somewhat more favourable to presumption, than that stated in the text, but they have not met with general approbation from the profession. See 2 Sug. V. & P. 196; Math., Pres. Ev. 215—217.

<sup>3</sup> Per Abbott, C. J., in *Doe v. Hilder*, 2 B. & A. 790; *Cottrell v. Hughes*, 15 Com. B. 532.

<sup>4</sup> *Bartlett v. Downes*, 3 B. & C. 616, 622, per Abbott, C. J.

§ 136. Questions respecting this head of presumptions frequently arose in former times, when juries used to be called upon to presume the surrender of *outstanding satisfied terms*;<sup>1</sup> but by an excellent Act,<sup>2</sup> which was passed in the year 1845, these questions were finally settled. The Act,—after reciting that “the assignment of satisfied terms has been found to be attended with great difficulty, delay, and expense, and to operate, in many cases, to the prejudice of the persons justly entitled to the lands to which they relate,”—enacts, that “every satisfied term of years, which *either by express declaration or by construction of law*,<sup>3</sup> shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any land, shall on that day absolutely cease and determine as to the land, upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by *express declaration*, although thereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said 31st day of December, 1845, and shall, for the purpose of such protection, be considered in every court of law and of equity to be a subsisting term.” § 2 enacts, that “every term of years now subsisting or hereafter to be created, becoming satisfied after the said 31st of December, 1845, and which by express declaration or construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land, upon the inheritance or reversion whereof such term shall become attendant as aforesaid.”<sup>4</sup>

<sup>1</sup> See *Garrard v. Tuck*, 8 Com. B. 231; *Doe v. Langdon*, 12 Q. B. 711.

<sup>2</sup> 8 & 9 V., c. 112. The rough draft of §§ 1 & 2 of this Act was drawn by Mr. Davidson, and settled by Mr. Christie. The subject was afterwards submitted to the Law Amend. Society, who sanctioned the proposed amendment; and the Bill was then drawn in its present form by one of the ablest members of that body, and became the law of the land under the auspices of Ld. Brougham.

<sup>3</sup> See *Doe v. Price*, 16 M. & W. 603; *Doe v. Mouldsdale*, id. 689; *Doe v. Jones*, 13 Q. B. 774; *Cottrell v. Hughes*, 15 Com. B. 532; *Plant v. Taylor*, 7 H. & N. 211.

<sup>4</sup> § 3 enacts, that “in the construction and for the purposes of this Act,

§ 137. Notwithstanding this Act, it is perfectly clear that no § 119 presumption can be allowed in favour of the surrender of a term which is still *unsatisfied*,<sup>1</sup> or the *continuance* of which is found in a special verdict, or admitted in a special case;<sup>2</sup> for, whatever individual hardship may result from the rule of law that a plaintiff seeking to recover land must rely on the strength of his own legal title, it is obviously absurd to permit any inference to be drawn, which is directly opposed, either to the ascertained fact, or to all reasonable belief.<sup>3</sup>

§ 138. A jury may also, under certain circumstances, presume § 120 the surrender of a lease by operation of law; for, although the production by the lessor of a cancelled lease will not warrant the presumption of such a surrender as will satisfy the Statute of Frauds;<sup>4</sup> yet, when that fact was coupled with proof that a new lease had been granted to another party, who, like the former lessee, was a mere trustee for the same *cestuis que trust*, and it further appeared, that when leases were renewed from time to time, the usage was to send in the old lease to be cancelled in the lessor's office, the jury were allowed to infer, that the second lease was granted with the assent of the former tenant, and then the court held<sup>5</sup> that this was as valid a surrender of the first interest by operation of law, as if the former tenancy had been determined in writing.<sup>6</sup> So, the unexplained payment of an abated rent for thirty years by a tenant of premises, which were shown to have been leased to another party for an unexpired term, has been treated in Ireland as evidence from which a jury might presume the surrender of the original lease, and the

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unless there be something in the subject or context repugnant to such construction, the word 'lands' shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share thereof respectively."

<sup>1</sup> *Doe v. Staple*, 2 T. R. 684, where the lessor of the plaintiff was heir-at-law, and only claimed the premises subject to the charge.

<sup>2</sup> *Goodtitle v. Jones*, 7 T. R. 47; *Roe v. Reade*, 8 id. 118.

<sup>3</sup> See per Bayley, J., in *R. v. Upton Gray*, 10 B. & C. 812.

<sup>4</sup> *Doe v. Thomas*, 9 B. & C. 299; 4 M. & R. 218, 8. C.; *Roe v. Abp. of York*, 6 East, 86.

<sup>5</sup> See *Thomas v. Cook*, 2 Stark. R. 408; 2 B. & A. 119, 8. C.

<sup>6</sup> *Walker v. Richardson*, 1 M. & W. 882. See post, §§ 1009, 1010.

creation of a new tenancy from year to year, at the abated rent, in favour of the present occupier.<sup>1</sup>

§ 139. The same principle has been applied to a variety of other matters. For example, where ejectment was brought to recover a messuage, which had been demised for a long term of years,—the lease containing a covenant by the lessee that the house should not be used as a shop without the written consent of the lessor, and a proviso for re-entry on the breach of such covenant,—the court held that, on proof of the uninterrupted user of the premises as a beer-shop for twenty years, the jury ought to be directed to presume that a license in writing had been duly given.<sup>2</sup> So, after the lapse of sixty years, the court, in the absence of any direct evidence, has presumed that executors, who were proved to have renounced, had also disclaimed an estate in a chattel real, which had been bequeathed to them by the testator.<sup>3</sup> Indeed, it may be stated as a general proposition,<sup>4</sup> that stale demands ought always to be regarded in courts of justice with jealous suspicion,<sup>5</sup> and that long acquiescence in any adverse claim of right is good ground, on which a jury may presume that the claim had a legal commencement;<sup>6</sup> since it is contrary to general experience for one man long to continue to pay money to another, or to perform any onerous duty, or to submit to any inconvenient claim, unless in pursuance of some contract, or other legal obligation<sup>7</sup>

<sup>1</sup> *Lefroy v. Walsh*, 1 Ir. Law R., N. S. 311. See, also, *Tennent v. Neil*, I. R., 5 C. L. 418, per Ex. Ch.; *In re Renew. Leaseh. Conv. Act*, Ex parte Raymond, I. R. 8 Eq. 231.

<sup>2</sup> *Gibson v. Doey*, 27 L. J., Ex. 37; S. C. nom. *Gibson v. Doeg*, 2 H. & N. 615.

<sup>3</sup> *M'Kenna v. Eager*, I. R., 9 C. L. 79.

<sup>4</sup> Gr. Ev. § 47, in great part.

<sup>5</sup> *Sibbering v. Ld. Balcarras*, 3 De Gex & Sm. 735. See H., falsely called C. v. C., 31 L. J., Pr. & Mat. 103; *T. v. D.*, falsely called D., 1 Law Rep., P. & D. 127. So, the non-user of a patent for a series of years raises a strong presumption of its practical inutility; *Re Allan's Patent*, 1 Law Rep., P. C. 507; 4 Moo. P. C., N. S. 443, S. C.; *Re Bakewell's Patent*, 15 Moo. P. C. 385; *Re Hughes' Patent*, 48 L. J., P. C. 20.

<sup>6</sup> See *Re Birch*, 17 Beav. 358.

<sup>7</sup> See *Castleden v. Castleden*, 9 H. of L. Cas. 186; 4 Macq. Sc. Cas. H. of L. 159, S. C.; *Ogilvie v. Currie*, 37 L. J., Ch. 541, per Ld. Cairns, Ch.

§ 140. The possession of stolen property *recently* after the commission of a theft, is *prima facie* evidence that the possessor was either the thief, or the receiver, according to the other circumstances of the case;<sup>1</sup> and this presumption, when unexplained,<sup>2</sup> either by direct evidence, or by the character and habits of the possessor, or otherwise, is usually regarded by the jury as conclusive.<sup>3</sup> The question as to what amounts to recent possession, varies according as the stolen article is or is not calculated to pass readily from hand to hand. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after they had been stolen, Mr. Justice Patteson held that the prisoner should explain how he came by the property.<sup>4</sup> But, where the only evidence against a prisoner was, that certain tools had been traced to his possession three months after their loss, Mr. Justice Parke directed an acquittal;<sup>5</sup> and Mr. Justice Maule pursued a similar course on an indictment for horse stealing, where it appeared that the horse was not discovered in the custody of the accused until after six months from the date of the robbery.<sup>6</sup> So, where goods, lost sixteen months before, were found in the prisoner's house, and no other evidence was adduced against him, he was not called upon for his defence.<sup>7</sup> Indeed, the finding of stolen property in the *house* of the accused, provided there were other inmates capable of committing the larceny, will of *itself* be insufficient to prove *his possession*, however recently the theft may have been effected;<sup>8</sup> though, if

<sup>1</sup> R. v. Langmead, 1 L. & Cave, 427; 9 Cox, 464, S. C.

<sup>2</sup> R. v. Exall, 4 Fost. & Fin. 922, per Pollock, C. B.

<sup>3</sup> 2 East, P. C. 656; R. v. —, 2 C. & P. 459; the State v. Adams, 1 Hayw. 463; Willa, Cir. Ev. 53. "Furtum præsumitur commissum ab illo, penes quem res furata inventa fuerit, adeo ut si non docuerit à quo rem habuerit, justè, ex illà inventione, poterit subijci tormentis." 2 Masc. de Prob., concl. 834; Menoch. de Præs. lib. 5, præc. 31. See ante, § 63.

<sup>4</sup> R. v. Partridge, 7 C. & P. 551.

<sup>5</sup> R. v. Adams, 3 C. & P. 600. See R. v. Cockin, 2 Lew. C. C. 235, where two sacks were found in the prisoner's possession twenty days after they had been missed; and Coleridge, J., left the question to the jury, observing, that "stolen property usually passes through many hands." See the observations of the Reporter on this presumption, *id.*

<sup>6</sup> R. v. Cooper, 3 C. & Kir. 318; R. v. Harris, 8 Cox, 333, per Channell, B.

<sup>7</sup> R. v. —, 2 C. & P. 459, per Bayley, J.

<sup>8</sup> 2 St. Ev. 614, n. g. See *Ex parte Ransley*, 3 D. & R. 572. In that case, 11 LAW OF EVID.—V. I. (3027)

coupled with proof of other suspicious circumstances, it may fully warrant the prisoner's conviction, even though the property be not found in his house until after his apprehension.<sup>1</sup>

§ 141. This presumption, which in all cases is one of *fact* rather than of law, is occasionally so strong as to render unnecessary any direct proof of what is called the *corpus delicti*. Thus, to borrow an apt illustration from Mr. Justice Maule, if a man were to go into the London Docks quite sober, and shortly afterwards were found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stowed, "I think," says the learned judge,—and most persons will probably agree with him,—"that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached, and that any wine had actually been missed."<sup>2</sup>

§ 142.<sup>3</sup> The presumption under discussion is not confined to cases of theft, but applies to all crimes, even the most penal. Thus, on an indictment for arson, proof that property, which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, has been held to raise a probable presumption that he was present and concerned in the offence.<sup>4</sup> A like inference has been raised in the case of murder accom-

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the bare finding of smuggled spirits in the defendant's house, during his absence from home, was held insufficient to support a conviction under 11 G. 1, c. 30, § 16 (now repealed by 30 & 31 V., c. 59), for knowingly harbouring and concealing three gallons of foreign Geneva, &c. Abbott, C. J., observed, "The mere naked fact of the spirits being found in the defendant's house during his absence cannot be considered as conclusive evidence of knowledge to support a conviction on this statute. There is abundant ground for suspicion, but we cannot say that it is a clear and satisfactory ground to convict." See also *R. v. Hale*, 2 Cowp. 728.

<sup>1</sup> *R. v. Watson*, 2 Stark. R. 139, per *Ld. Ellenborough & Abbott, J.*

<sup>2</sup> *R. v. Barton*, Pearce & D. 284. See, also, *R. v. Mockford*, 11 Cox, 16. In *R. v. Williams*, 11 Cox, 684, Montague Smith, J., is reported to have laid down the law in a very different spirit; but that case surely cannot be relied upon.

<sup>3</sup> *Gr. Ev.* § 34.

<sup>4</sup> *R. v. Rickman*, 2 East, P. C. 1035.

panied by robbery,<sup>1</sup> in the case of burglary,<sup>2</sup> and in the case of the possession of a quantity of counterfeit money.<sup>3</sup>

§ 143. One of the most important presumptions known to the law is that which is usually embodied in the maxim "*omnia præsumentur ritè esse acta.*" This presumption,—which in principle is nearly allied to that of innocence,—is, as we have seen,<sup>4</sup> in some instances conclusive, but in the great majority of cases to which it applies, it is only available, donec probetur in contrarium.<sup>5</sup> The application of this presumption to *acts* of an *official* or *judicial* character will be best illustrated by referring to one or two decisions.<sup>6</sup> For instance, it has been held, that, where successive decisions are inconsistent with a general order of the court, reversal of that order ought to be presumed.<sup>7</sup> So, on an indictment for perjury in an answer to a bill in Chancery under the old practice, proof of the signatures of the defendant, and of the Master in Chancery before whom the answer purported to have been sworn, has been held sufficient evidence that the defendant was regularly sworn to the truth of its contents, though the clerk, who proved the handwriting of the Master, had no recollection of administering the oath, and admitted that the jurat was not written by himself.<sup>8</sup> So, where a town was proved to be in the military occupation of an enemy, and proclamations, purporting to be signed by the general in command, were posted on its walls, this was held to be evidence whence a jury might infer that the placards had been printed and posted by the authority of the commander.<sup>9</sup> § 124

§ 144. Again, on an indictment for bigamy, proof of the § 124

<sup>1</sup> Wills, Cir. Ev. 61.

<sup>2</sup> See *R. v. Gould*, 9 C. & P. 364; *R. v. Exall*, 4 Fost. & Fin. 922.

<sup>3</sup> *R. v. Fuller*, R. & R. 308; *R. v. Jarvis*, 25 L. J., M. C. 30; *Pearce & D.* 552, S. C. <sup>4</sup> Ante, §§ 84—88.

<sup>5</sup> See *R. v. Bjornsen*, 1 L. & Cave, 545; 10 Cox, 74; 34 L. J., M. C. 180, S. C.

<sup>6</sup> See, also, *Lee v. Johnstone*, 1 Law Rep., H. L. Sc. 426.

<sup>7</sup> *Bohun v. Delessert*; 2 Coop. 21, per Id. Eldon; *Man v. Ricketts*, id. 8, 21, per Id. Lyndhurst.

<sup>8</sup> *R. v. Benson*, 2 Camp. 508, per Id. Ellenborough. See, also, *Cheney v. Courtois*, 13 Com. B., N. S. 634. <sup>9</sup> *Bruce v. Nicolopulo*, 11 Ex. R. 129.

solemnisation of the first marriage in a Wesleyan chapel in the presence of the registrar, and of the entry of such marriage in his book, has been held to raise a *prima facie* presumption that the chapel was duly registered;<sup>1</sup> and in another similar prosecution, where the marriage was shown by a witness present at it to have been solemnised in a parish church by the curate of the parish, it was deemed unnecessary to prove either the registration of the marriage, or the fact of any licence having been granted, or of any banns having been published.<sup>2</sup> So, the constant performance of divine service from an early period in a chapel, raises a *prima facie* presumption that it has been duly consecrated.<sup>3</sup>

§ 144A. A recent decision in Ireland has carried this presumption to its extreme limit. In that case a shopkeeper, prior to the passing of the Weights and Measures Act, 1878,<sup>4</sup> was prosecuted for using weights which were light when compared with the county standard, but no proof was furnished that the county standard had been compared with the imperial standard within the last five years, although such comparison was expressly required by statute. The court, however, held that this evidence was unnecessary, the *prima facie* presumption being that the officials in charge of the local standards had performed their duty, and that, consequently, the comparison had been properly made.<sup>5</sup>

§ 145. Again, a party being detained for debt in the gaol of the sheriff of Devonshire, a writ of *ca. sa.* at the suit of the sheriff was directed to the coroner of the county, and was lodged with the keeper of the gaol. On motion to discharge this party out of custody on the ground of irregularity in the proceedings, it did not appear from the affidavits that the writ was ever in

§ 134

<sup>1</sup> *R. v. Mainwaring*, 26 L. J., M. C. 10; 7 Cox, 192; *Dear. & Bell*, 132, S. C.; *Sichel v. Lambert*, 15 Com. B., N. S. 781; 33 L. J., C. P. 137, S. C.; *R. v. Cradock*, 3 Fost. & Fin. 837, per Willes, J., and Pollock, C. B.

<sup>2</sup> *R. v. Allison*, R. & R. 109. See *Limerick v. Limerick*, 32 L. J., Pr. & Mat. 22; 4 Swab. & Trist. 252, S. C.

<sup>3</sup> *Rugg v. Kingsmill*, 1 Law Rep., Adm. & Ecc. 343; *R. v. Cresswell*, 45 L. J., M. C. 77; 13 Cox, 126; and L. R. 1 Q. B. D. 446, S. C.

<sup>4</sup> 41 & 42 V., c. 49.

<sup>5</sup> *Hill v. Hennigan*, I. R., 11 C. L. 522.



the coroner's hands, but in a return which the gaolor had made to a writ of habeas corpus previously issued, the *ca. sa.* was set out, together with a certificate by the coroner, that this was a true copy of the writ. Upon these facts the court gave such credit to the regularity of the proceedings, as to presume that the writ had in due course come to the gaolor through the coroner.<sup>1</sup> So, where a parish certificate purported to be granted by A, the only churchwarden, and B, the only overseer of the parish, the court, after a lapse of sixty years, during which time the appellant parish had submitted to the certificate, presumed in its favour that, by custom, there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them was dead, and his vacancy not filled up at the date of the certificate.<sup>2</sup> A like presumption was made in favour of a parish indenture of apprenticeship, which was signed only by one churchwarden and one overseer.<sup>3</sup> So, where a parish deed of apprenticeship had been allowed by the justices pursuant to the statute,<sup>4</sup> the court, in the absence of evidence to the contrary, presumed that notice had been duly given to the officers of the parish, where the apprentice was to serve;<sup>5</sup> and where a similar indenture, certified by the allowance of the justices, contained a recital of the order of binding, it was held that no evidence of such order, beyond the indenture itself, was necessary.<sup>6</sup> So, where the deed of apprenticeship, executed thirty years before, and under which the apprentice had regularly served his time, was proved to be lost, and it further appeared that the parish, in which the pauper was settled under this indenture, had relieved him for the last twelve years, the court considered that the Sessions had acted rightly in presuming that the deed was properly stamped, though

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<sup>1</sup> *Bastard v. Trutch*, 3 A. & E. 451; 5 N. & M. 109; 4 Dowl. 6, S. C.

<sup>2</sup> *R. v. Catesby*, 2 B. & C. 814; see, also, *R. v. Whitchurch* 7 B. & C. 573. From *R. v. Upton Gray*, 10 B. & C. 807, it appears that this presumption is rather one of *fact* than of *law*.

<sup>3</sup> *R. v. Hinckley*, 12 East, 361; *R. v. Stainforth*, 11 Q. B. 66.

<sup>4</sup> 56 G. 3, c. 139, §§ 1, 2; 3. & 4 W. 4, c. 63, § 1.

<sup>5</sup> *R. v. Whiston*, 4 A. & E. 607; 6 N. & M. 65, S. C.; *R. v. Whitney*, 5 A. & E. 191; 6 N. & M. 552, S. C.

<sup>6</sup> *R. v. Stainforth* 11 Q. B. 66. See, also, *R. v. St. Mary Magdalen*, 2 E. & B. 809; *R. v. Broadhempston*, 28 L. J., M. C. 18; 1 E. & E. 154, S. C.

the stamp officers proved that it did not appear in their office, that any such indenture had been stamped during the last thirty-one years.<sup>1</sup>

§ 146. In like manner every reasonable intendment will be made in support of an order of justices, provided it appear on the face of the order that the justices had jurisdiction;<sup>2</sup> but this rule does not extend to convictions, which combining, as they do summary power with penal consequences, are watched with peculiar vigilance by the superior courts, and are construed with at least as great strictness as indictments.<sup>3</sup> Still, even with respect to convictions, if the *authority* of the magistrate can be distinctly collected from the facts stated on the record, the court will not be *astute* in discovering irregularities in the proceedings; and the safest rule which can be laid down on the subject is, in the words of Lord Ellenborough, that the court “*can* intend nothing in favour of convictions, and *will* intend nothing against them.”<sup>4</sup> § 125

§ 147. Neither does this presumption apply so as in any event to *give jurisdiction* to inferior courts, or to magistrates, or others, acting judicially under a special statutory power; but in all such cases, every circumstance required by the statute to give jurisdiction *must* appear on the face of the proceedings, either by direct averment, or by reasonable intendment.<sup>5</sup> There is no § 136

<sup>1</sup> *R. v. Long Buckby*, 7 East, 45. In this case, as also in that of *R. v. Catesby*, 2 B. & C. 814, the judgment of the court partly rested on the presumption of validity arising from long acquiescence. See ante, §§ 126—131, 139.

<sup>2</sup> *R. v. Morris*, 4 T. R. 552, per *Ld. Kenyon*; *Ormerod v. Chadwick*, 16 M. & W. 367; *R. v. Preston*, 12 Q. B. 816, 825, 826; *R. v. Stainforth*, 11 Q. B. 66.

<sup>3</sup> *R. v. Morris* 4 T. R. 552; *R. v. Baines*, 2 *Ld. Ray*. 1265, 1269; *Fletcher v. Calthrop*, 6 Q. B. 880, 891; *R. v. Little*, 1 *Burr.* 613, per *Ld. Mansfield*; *R. v. Corden*, 4 *id.* 2281, where the court observed that “a tight hand ought to be holden over these summary convictions;” *R. v. Pain*, 7 D. & R. 678, per *Abbott*, C. J.; *R. v. Daman*, 2 B. & A. 378.

<sup>4</sup> *R. v. Hazell*, 13 East, 141. See *Paley on Conv.* 74—77.

<sup>5</sup> *R. v. All Saints, Southampton*, 7 B. & C. 790, per *Holroyd, J.*; *Gosset v. Howard*, 10 Q. B. 452, 453; *R. v. Helling*, 1 Str. 8, per *Pratt, C. J.*; *R. v. Totness*, 11 Q. B. 80; *R. v. Hulcott*, 6 T. R. 583.

distinction, in this respect, between convictions, commitments,<sup>1</sup> inquisitions, warrants to arrest, examinations, or orders;<sup>2</sup> and whether the order be made by the Lord Chancellor, under the special Act, or by a justice of the peace, the facts which gave the authority must be stated.<sup>3</sup> But though the High Court of Justice, in the exercise of its superintending power, will intend nothing in favour of inferior jurisdictions, it will intend nothing against them, but will decide according to the very language employed in the order or other judicial document.<sup>4</sup> On motions for a prohibition, the judges of that court have more than once emphatically rejected any intendment that the Ecclesiastical Courts would outstep their duty, or act in any way inconsistently with the law;<sup>5</sup> and on the same principle they have refused to anticipate the decision of the master on a question of costs, as they cannot presume that he will decide erroneously.<sup>6</sup>

§ 147A. In a few cases the presumption under discussion has, by some caprice of the law or of the lawyers, been ignored, though its recognition would have been productive of much public advantage. For example, if a highway rate has been duly entered in a rate-book the non-legal mind might imagine that the production of the official book would furnish at least *prima facie* evidence, not only of the allowance of the rate by the justices, but also of its publication in accordance with the law. Yet this is not the case; and the fact that the rate has been duly published must still be proved by independent evidence.<sup>7</sup> With poor-rates the law is

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<sup>1</sup> But a warrant of commitment which purports to be founded on a preceding conviction will be good, though it does not state that the evidence was given on oath, or in the presence of the prisoner, *Ex parte Bailey*, & *Ex parte Collier*, 23 L. J., M. C. 161; 3 E. & B. 607, S. C.

<sup>2</sup> *Day v. King*, 5 A. & E. 359, per Williams, J.; *Brook v. Jenney*, 2 Q. B. 273, per id.; *Johnson v. Reid*, 6 M. & W. 124; *Gossett v. Howard*, 10 Q. B. 453.

<sup>3</sup> *Christie v. Unwin*, 11 A. & E. 379, per Coleridge, J.

<sup>4</sup> *R. v. Helling*, 1 Str. 8, per Pratt, C. J.; *Christie v. Unwin*, 11 A. & E. 379, per Coleridge, J.; *In re Clarke* 2 Q. B. 630, per *Ld. Denman*.

<sup>5</sup> *Chesterton v. Farlar*, 7 A. & E. 713; *Hall v. Maule*, id. 721; *Hallack v. U. of Cambridge*, 1 Q. B. 593, 614, 615.

<sup>6</sup> *Head v. Baldry*, 8 A. & E. 605.

<sup>7</sup> *Bird v. Adcock*, 47 L. J., M. C. 123.

different; for the Legislature in favour of those imposts has specially enacted, that "the production of the book purporting to contain a poor-rate, with the allowance of the rate by the justices, shall, if the rate is made in the form prescribed by law, be *prima facie* evidence of the due making and publication of such rate."<sup>1</sup>

§ 148. This presumption has, in many instances, been recognised in support of the solemn acts of even *private* persons, but a reference to a few of the more modern cases will, it is hoped, be sufficient to illustrate its operation in connexion with such acts. Thus, although in the case of contracts not under seal, a consideration must in general be averred and proved, yet *bills of exchange* and promissory notes enjoy the privilege of being presumed, *prima facie*, to be founded on a valuable consideration.<sup>2</sup> The law raises this presumption in favour of these instruments, partly, because it is important to preserve their negotiability intact, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves, and the deliberate mode in which they are executed.<sup>3</sup> So, if secondary evidence is tendered to prove the contents of an instrument, which is either lost, or retained by the opposite party after notice to produce it, the court will presume that the original was duly stamped, unless some evidence to the contrary, as, for example, that it was unstamped when last seen,<sup>4</sup> can be given.<sup>5</sup> So, under the Act of 1877 to facilitate leases and sales of settled estates, the execution of a lease by the lessor furnishes sufficient presumptive evidence that the counterpart has been duly executed by the lessee.<sup>6</sup> So, where lands

<sup>1</sup> "The Poor-Rate Assessment and Collection Act, 1869," 32 & 33 V., c. 41, § 18.

<sup>2</sup> 45 & 46 V., c. 61, § 30. *Collins v. Martin*, 1 B. & P. 651; *Holliday v. Atkinson*, 5 B. & C. 501; *Story, Bills*, §§ 16, 178. See *ante*, § 86.

<sup>3</sup> *Story, Bills*, §§ 16, 178.

<sup>4</sup> *Marine Investment Co. v. Havaside*, 5 Law Rep., H. L. 624; 42 L. J., Ch. 173, per Dom. Proc. S. C.

<sup>5</sup> *Hart v. Hart*, 1 Hare, 1, per Wigram, V.-C.; *Crowther v. Solomons*, 6 Com. B. 758; *Pooley v. Goodwin*, 4 A. & E. 94; *Crisp v. Anderson*, 1 Stark. R. 35; *R. v. Long Buckby*, 7 East, 45; *Closmadeuc v. Carrel*, 18 Com. B. 36. See *Arbon v. Fussell*, 1 New R. 31, per Ex.; *Connor v. Cronin*, 7 Ir. Law R. 480; *Herbert v. Rae*, 13 Ir. Eq. R., N. S. 25, per Smith, M. R.; 33 & 34 V., c. 46, § 58, Ir.

<sup>6</sup> 40 & 41 V., c. 18, § 48.

originally leasehold have been dealt with as freehold for a long period by persons in possession, a presumption will be raised, as between parties claiming under such persons, that the reversion has been got in.<sup>1</sup> So, in the absence of all proof, as to which of two deeds of even date was first executed, the court will presume in favour of that order of priority, which will best support the clear intent of the parties.<sup>2</sup> So, where an act has been done by a joint stock company, to the legality of which certain formalities are requisite, and the circumstances are such that acquiescence may be imputed to the shareholders, a compliance with the necessary formalities will, as against the company, be presumed.<sup>3</sup>

§ 149. In like manner, where the *attestation* of a *deed* has been in the usual form,<sup>4</sup> and the signature of the party has been proved, the jury have more than once been advised to presume a due sealing and delivery, and that, too, in cases where the attesting witness has denied all recollection of any other form having been gone through beyond the mere signing.<sup>5</sup> Neither is it necessary, in order to constitute a valid sealing, that an impression should be made with wax or with a wafer, but an impression made in ink with a wooden block will suffice;<sup>6</sup> and even though no impression appear on the parchment or paper, still, if the instrument be a

<sup>1</sup> Holmes v. Milward, 47 L. J., Ch. 522, per Fry, J.

<sup>2</sup> Taylor v. Horde, 1 Burr. 107. See R. v. Ashburton, 8 Q. B. 876; Gartside v. Silkstone, &c., Co., L. R. 21 Ch. D. 762, per Fry, J.; 51 L. J., Ch. 828, S. C.

<sup>3</sup> Re the British Prov. Life & Fire Ass. Soc., 32 L. J., Ch. 326; 1 De Gex, J. & S. 488, S. C., nom. Grady's case; Lane's Case, 1 De Gex, J. & S. 504, 513, per Ld. Westbury, C.

<sup>4</sup> As to presumption in favour of a will having a due attestation clause, see post, § 1056.

<sup>5</sup> Fasset v. Brown, Pea. R. 23; Grellier v. Neale, id. 146, per Ld. Kenyon; Talbot v. Hodgson 7 Taunt. 251; Hall v. Bainbridge, 12 Q. B. 699; Burling v. Paterson, 9 C. & P. 570, per Patteson, J.; Davidson v. Cooper, 11 M. & W. 784, per Ld. Abinger. See also, Doe v. Lewis, 7 C. & P. 574; Doe v. Burdett, 4 A. & E. 1; 9 A. & E. 936; 6 M. & Gr. 386; 10 Cl. & Fin. 340, S. C.; Newton v. Ricketts, 8 H. of L. Cas. 262; and Burnham v. Bennett, 1 De Gex & Sm. 513. This presumption, though formerly treated as one of law, is now properly considered as one of fact, and the question is in all cases left to the jury.

<sup>6</sup> R. v. St. Paul's, Covent Garden, 7 Q. B. 232.  
(3035)

deed, and on proper stamps, and be stated in the attestation to have been duly sealed and delivered, it will, in the absence of evidence to the contrary, and especially if it be an ancient instrument,<sup>1</sup> be presumed to have been sealed.<sup>2</sup> Moreover, when a deed is executed by a corporate body, the *common seal* need not be affixed, but the corporation may, if they think fit, *adopt* any *private seal* for the occasion, and the jury may presume that the use of the adopted seal was a corporate act, if the instrument purport to be executed by the head and the subordinate members of the corporation "under their seal."<sup>3</sup> The presumption in favour of the due execution of instruments was carried to a great length in the case of *Cherry v. Heming*.<sup>4</sup> That was an action of covenant brought by the assignor against the assignees of certain letters-patent to recover the consideration money for the assignment, and one of the defendants named Heming pleaded non est factum. At the trial Heming produced the deed, which was signed and executed by all the parties to it except himself; but although a seal had been placed for him in the usual way, his signature was not attached, neither was there any attesting witness to his execution. As, however, he had acted under the deed, and recognised it as a valid instrument, the jury presumed, with the approbation of the court, that he had duly executed it.

§ 150. Again, in the absence of evidence to the contrary the law presumes that a man knows the contents of any deed which he executes.<sup>5</sup> But although the courts are in general bound to presume *prima facie* in favour of deeds, which appear to have been duly executed, an exception to this rule is recognised, where sales are sought to be set aside by the creditors of the vendor, as fraudulent within the Stat. 13 El. c. 5. This excellent Act,—made perpetual by 26 & 27 V., c. 125,—enacts in substance, that

<sup>1</sup> *Crawford & Lindsay Peer.*, 2 H. of L. Cas. 534, 543, 550—552.

<sup>2</sup> *In re Sandilands*, 6 Law Rep., C. P. 411; Sug. Pow. 232, cited by Ld. Denman in *R. v. St. Paul's, Covent Garden*, 7 Q. B. 238.

<sup>3</sup> *Jones v. Galway Town Commiss.*, 11 Ir. Law R. 435.

<sup>4</sup> 19 L. J., Ex. 63; 4 Ex. R. 633, S. C.

<sup>5</sup> *Cooper*, in re, *Cooper v. Cooper*, L. R. 20 Ch. D. 611, 629, per Jessel, M. R.

all conveyances of lands or chattles, which are not made for a valuable consideration and bona fide,<sup>1</sup> shall be void as against any person, including the Crown,<sup>2</sup> whose claims on the original owner of the property shall be thereby delayed or disturbed.<sup>3</sup> Whenever, therefore, any transaction is sought to be invalidated by virtue of this Act, it becomes necessary for the vendor to establish the justice of his title, and to show affirmatively, not only that the deed under which he claims was duly executed, but that it was made in perfect good faith, and also for a valuable, as contradistinguished from a mere good, consideration.<sup>4</sup> In determining the question of bona fides, the jury will take into consideration all the circumstances connected with the transfer, always bearing in mind, that, if the conveyance is absolute, that is, if it passes to the vendee an immediate right of possession, the fact of the vendor being allowed to continue as the apparent owner of the property, must naturally raise a very strong presumption of fraud.<sup>5</sup> If, indeed, the conveyance or bill of sale is by way of mortgage, and the mortgagee is not to take possession till a default in payment of the mortgage money, then, as the nature of the transaction does not call for any change of possession, the absence of such change will not of itself furnish any evidence of collusion.<sup>6</sup>

§ 150A. So far as bills of sale of personal chattels are concerned it will seldom be necessary to call in aid the Statute of Elizabeth;

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<sup>1</sup> See *In re Ridler*, *Ridler v. Ridler*, L. R., 22 Ch. D. 74, per Ct. of App.; 52 L. J., Ch. 343, S. C.

<sup>2</sup> *Shaw v. Bran*, 1 Stark. R. 319; *Morewood v. Wilkes*, 6 C. & P. 144; *Perkins v. Bradley*, 1 Hare, 219. See *Whitaker v. Wisbey*, 12 Com. B. 44.

<sup>3</sup> See *Freeman v. Pope*, 9 Law Rep., Eq. 206; 39 L. J., Ch. 148, S. C.; 5 Law Rep., Ch. Ap. 538, and 39 L. J., Ch. 689, S. C.; *Crossley v. Elworthy*, 12 Law Rep., Eq. 158; *Cornish v. Clark*, 14 Law Rep., Eq. 184; per Ld. Romilly; 42 L. J., Ch. 14, S. C.; *Kent v. Riley*, 14 Law Rep., Eq. 190, per Ld. Romilly; *Golden v. Gillam*, 51 L. J., Ch. 154; L. R. 20 Ch. D. 389, S. C.; aff. on app.; 51 L. J., Ch. 503; *Russell*, ex parte, re *Butterworth*, 51 L. J., Ch. 521, per Ct. of App.

<sup>4</sup> *Twyne's case*, 3 Coke, 80; 1 Smith; L. C. 1, S. C.

<sup>5</sup> *Martindale v. Booth*, 3 B. & Ad. 498; 1 Smith, L. C. 11, 12; *Lindon v. Sharp*, 6 M. & Gr. 898, per Tindal, C. J.

<sup>6</sup> *Martindale v. Booth*, 3 B. & Ad. 498; 1 Smith, L. C. 13, 14.

for under "The Bills of Sale Act, 1882," these instruments are now rendered void unless they set forth the consideration for which they were given.<sup>1</sup>

§ 151. In deciding upon the validity or invalidity of deeds, the courts now act upon more enlightened principles than used to be recognised at common law; and whenever it is shown to them that any person by donation derives a benefit under a deed to the prejudice of another person,<sup>2</sup>—and the more especially so, if any confidential or fiduciary relation subsists between the parties,—they so far presume against the validity of the instrument, as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, over-reaching, undue influence, or unconscionable advantage.<sup>3</sup> For example, if a deed of gift, or other disposition of property, except a will,<sup>4</sup> be made in favour of a solicitor by a client,<sup>5</sup> of a medical attendant by a patient,<sup>6</sup> of a parson by one of his congregation,<sup>7</sup> of a "spiritual medium" by one of his dupes,<sup>8</sup> of a trustee by a beneficiary,<sup>9</sup> of an executor by a legatee,<sup>10</sup> of a guardian by a ward, of a parent by a

<sup>1</sup> 45 & 46 V., c. 43, § 8; 42 & 43 V., c. 50, § 8, Ir. As to what is a sufficient compliance with this rule, see *Ex parte Firth*, re Cowburn, L. R., 19 Ch. D. 419; 51 L. J., Ch. 473, S. C.; *Hamlyn v. Betteley*, L. R., 5 C. P. D. 327; 49 L. J., C. P. 465, S. C.; *Hamilton v. Chaine*, 50 L. J., Q. B. 456, per Ct. of App.; L. R. 7 Q. B. D. 1, 319, S. C.; *Ex parte Rolfe*, re Spindler, L. R., 19 Ch. D. 98; 51 L. J., Ch. 88, nom. *Re Spindler*, ex parte Rolfe, per Ct. of App.

<sup>2</sup> *Cooke v. Lamette*, 15 Beav. 234, per Romilly, M. R. See *Coutts v. Acworth*, 38 L. J., Ch. 694; 8 Law Rep., Eq. 558, S. C.

<sup>3</sup> 1 Story, Eq. Jur. §§ 308—323. See *Baker v. Bradley*, 25 L. J., Ch. 7.

<sup>4</sup> *Parfitt v. Lawless*, 41 L. J., Pr. & Mat. 68; 2 Law Rep., P. & D. 462, S. C. See *Ashwell v. Lomi*, 2 Law Rep., P. & D. 477.

<sup>5</sup> *Gresley v. Mousley*, 28 L. J., Ch. 620; 1 Giff. 450, S. C.; 4 De Gex & J. 78, S. C.; *O'Brien v. Lewis*, 32 L. J., Ch. 569, 4 Giff. 221, S. C.; *Gardener v. Ennor*, 35 Beav. 549; *M'Pherson v. Watt*, L. R., 3 App. Cas. 254, in Dom. Proc., Sc.

<sup>6</sup> *Mitchell v. Homfray*, 50 L. J., Q. B. 460, per Ct. of App.; L. R. 8 Q. B. D. 587, S. C.; *Dent v. Bennett*, 4 Myl. & Cr. 569.

<sup>7</sup> *Nottidge v. Prince*, 2 Giff. 246; *Huguenin v. Baseley*, 14 Ves. 273.

<sup>8</sup> *Lyon v. Home*, 37 L. J., Ch. 674, per Giffard, V.-C.; 6 Law Rep., Eq. 655, S. C.

<sup>9</sup> *Luft v. Lord*, 34 Beav. 220.

<sup>10</sup> *Gray v. Warner*, 42 L. J., Ch. 556, per Wickens, V.-C.



child,<sup>1</sup> of a husband by a wife, of an agent by a principal,<sup>2</sup> or of a shrewd man of business by an infirm ignorant old woman,<sup>3</sup> the court will regard the matter with jealous suspicion, and will either set aside the instrument as conclusively void,<sup>4</sup> or will throw upon the person benefited the burthen of establishing beyond all reasonable doubt the perfect fairness and honesty of the entire transaction.<sup>5</sup>

§ 152. A grotesque attempt has been made in Ireland to extend § 129 this salutary doctrine to a case, which assuredly its framers never contemplated. A woman, while living in adultery with a married man, had in the ardour of her affection assigned some of her property to secure a debt which was owing by her paramour. When her passion cooled, her generosity seemed to have cooled also; and after the lapse of a short period she had the hardihood to apply to the Court of Chancery to set aside her assignment on the ground of undue influence. Her prayer was of course rejected, the court holding that the doctrine on which she relied for relief was only applicable when some lawful relation had been contracted between the parties.<sup>6</sup>

§ 153. The old Court of Chancery was wont to look with § 129 A peculiar, if not with discreet, favour on heirs apparent and other

<sup>1</sup> *Wright v. Vanderplank*, 2 Kay & J. 1; 25 L. J., Ch. 753; 8 De Gex, M. & G. 133, S. C.; *Bainbrigge v. Browne*, L. R., 18 Ch. D. 188, per Fry, J.; *Hartopp v. Hartopp*, 21 Beav. 259; *Dimsdale v. Dimsdale*, 25 L. J., Ch. 806; *Bury v. Oppenheim*, 26 Beav. 594; *Davies v. Davies*, 2 New R. 384, per Stuart, V.-C.; 4 Giff. 417, S. C.; *Potts v. Surr*, 34 Beav. 543; *Turner v. Collins*, 7 Law Rep., Ch. Ap. 329.

<sup>2</sup> *King v. Anderson*, I. R. 8 Eq. 147.

<sup>3</sup> *Baker v. Monk*, 33 Beav. 419; 4 De Gex, J. & S. 388, S. C., by Lds. Ja.; *Summers v. Griffiths*, 35 Beav. 27; *Slator v. Nolan*, I. R. 11 Eq. 367.

<sup>4</sup> *Tomson v. Judge*, 3 Drew. 306. This was the case of a deed of gift by a client to his solicitor.

<sup>5</sup> 1 Story, Eq. Jur. §§ 308—323; *Hunter v. Atkins*, 3 Myl. & K. 113; *Nedby v. Nedby*, 21 L. J., Ch. 446; *Hoghton v. Hoghton*, 15 Beav. 278; *Grosvenor v. Sherratt*, 28 Beav. 659; *Savery v. King*, 5 H. of L. Cas. 627, 655, 656; *Espey v. Lake*, 10 Hare, 260; *Billage v. Southee*, 9 Hare, 534. See *Price v. Price*, 1 De Gex, M. & G. 308; *Toker v. Toker*, 31 Beav. 629; 3 De Gex, J. & S. 487, S. C.; *Phillips v. Mullings*, 7 Law Rep., Ch. Ap. 244; *King v. Anderson*, I. R. 8 Eq. 625, per Ct. of App., reversing S. C. id. 150. See *Taylor v. Johnston*, 51 L. J., Ch. 879.

<sup>6</sup> *Hargreave v. Everard*, 6 Ir. Eq. R., N. S. 278.

expectant heirs, when they entered into negotiations which related to their expectancies.<sup>1</sup> Every person, therefore, who dealt with an expectant heir for his reversion was, in equity at least, *prima facie* presumed to be a knave; and if the transaction were subsequently disputed, the burthen of proof would lie upon him to establish its entire fairness.<sup>2</sup> The soundness of this doctrine was at length questioned by some of our prominent lawyers,<sup>3</sup> and at their instance an Act was passed in December, 1867, which enacts, that "no purchase made *bona fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of under-value."<sup>4</sup> It will be noted that this enactment is carefully limited to purchases "made *bona fide* and without fraud or unfair dealing," and it not only leaves untouched the law which governs unconscionable bargains, but it allows under-value to be still regarded by the court as a material element in cases where fraud is charged.<sup>5</sup>

§ 154. Another important presumption recognised in equity is, that a tenant for life, or other person having a partial interest in settled estates, who pays off an incumbrance upon them, intends, *prima facie*, to keep alive the charge against the inheritance for his own benefit.<sup>6</sup> This presumption, however, has, on technical

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<sup>1</sup> *Bromley v. Smith*, 26 Beav. 644, 665; *Ld. Portmore v. Taylor*, 4 Sim. 182; *Davies v. D. of Marlborough*, 2 Swanst. 108; *Sharp v. Leach*, 31 Beav. 491; *Croft v. Graham*, 2 De Gex, J. & S. 155; *Perfect v. Lane*, 3 De Gex, F. & J. 369; *Benyon v. Fitch*, 35 Beav. 570.

<sup>2</sup> See cases cited in last note.

<sup>3</sup> See *Webster v. Cook*, 2 Law Rep., Ch. Ap. 542, per *Ld. Chelmsford*, C.; 36 L. J., Ch. 753, S. C.

<sup>4</sup> 31 V., c. 4, § 1. See *Miller v. Cook*, 10 Law Rep., Eq. 641; 40 L. J., Ch. 11, S. C.; *Tyler v. Yates*, 11 Law Rep., Eq. 265; 6 Law Rep., Ch. Ap. 665; & 40 L. J., Ch. 768, S. C., per *Ld. Hatherley*, C.; *Judd v. Green*, 45 L. J., Ch. 108.

<sup>5</sup> *Ld. Aylesford v. Morris*, 8 Law Rep., Ch. Ap. 490, per *Ld. Selborne*, C.; 42 L. J., Ch. 546, 548, S. C.; *Beynon v. Cook*, 10 Law Rep., Ch. Ap. 339. See, also, *Nevill v. Snelling*, 49 L. J., Ch. 777, per *Denman*, J.; L. R., 15 Ch. D. 679, S. C.; *O'Rorke v. Bolingbroke*, L. R., 2 App. Cas. 814, per *Dom Proc.*, Ir. See, too, *Gen.*, Ch. xxv. vv. 29—34.

<sup>6</sup> *Morley v. Morley*, and *Harland v. Morley*, 25 L. J. Ch. 1; 5 De Gex, M. & G. 610, S. C. See post, § 176A.

rather than substantial grounds, been held inapplicable to a case where a tenant for life had paid off the bond debts of the settlor.<sup>1</sup> Neither does it extend to the case of a charge bearing interest, where,—the rents and profits of the estate having been insufficient to meet the interest,—the tenant for life has paid the balance of it out of his own pocket, without having warned the remainderman of his intention to charge the excess of his payments on the inheritance. Here equity recognises a counter-presumption, and conclusively infers, as against the personal representatives of the tenant for life, either that the rents and profits were sufficient to keep down the interest, or that the tenant for life meant to waive his right to bring any charge upon the inheritance for the deficiency.<sup>2</sup>

§ 155. In dealing with *charitable institutions*, and in interpreting charitable grants, the courts also recognise certain definite presumptions. Thus, if the charity were founded to support a religious establishment, or to promote religious education, and the intentions of the founder be not clearly expressed, the *prima facie* presumption is, first, that he intended to support an establishment belonging to some particular form of religion, or to promote the teaching of certain particular doctrine; next, that the form of religion or doctrine contemplated was that which he himself had professed; and lastly, if no evidence be adduced of his entertaining peculiar religious views, that the established religion of the country was the one meant to be supported. If, however, the charity were founded for purposes of mere secular education, or if it were one of a purely eleemosynary character, the court, in the absence of any expressed intention to the contrary, will presume that the instruction in the one case was intended to be open at least to all denominations of Christians, and that the bounty in the other might be shared by all persons in distress, whatever erroneous opinions on the subject of worship they might chance to entertain.<sup>3</sup> § 129c

<sup>1</sup> *Id.* See *Roddam v. Morley*, 25 L. J., Ch. 329; 26 L. J., Ch. 438, S. C.

<sup>2</sup> *Ld. Kensington v. Bouverie*, 7 H. of L. Cas. 557.

<sup>3</sup> *Att.-Gen. v. Calvert*, 23 Beav. 248, per Romilly, M. R., in an elaborate judgment.

§ 156. All courts now hold,—contrary to what was once considered to be the law,—that an estate for life without impeachment of waste does not confer upon the tenant for life any legal right to commit “*equitable waste*,” unless an intention to confer such right expressly appears in the instrument creating the estate.<sup>1</sup>

§ 157. The presumptions, or, rather, the rules of construction § 120 recognised in equity with respect to *joint tenancy* are sufficiently singular. Thus, if two persons jointly advance money on mortgage, a mere tenancy in common will be created, though the property be conveyed to them as joint tenants, because in this case the law presumes that men will not willingly speculate with money which they lend.<sup>2</sup> But, on the other hand, if two persons, jointly advance money as purchasers, and the sums paid by each be equal, a joint-tenancy will be established, because here it is supposed that men will readily gamble as to survivorship with respect to property which they buy.<sup>3</sup> The reasoning, which draws a distinction between these two cases, has been denounced by an able judge as “not very comprehensible;”<sup>4</sup> and, indeed, it savours of the legal subtlety of a bygone age. Still, the law on this point seems to be settled, though the courts have so far yielded to common sense as to hold, that, if two persons make a purchase, and one of them advances more of the purchase money than the other, there shall be no survivorship, notwithstanding that the words “equally to be divided” be omitted from the deed.<sup>5</sup>

§ 158. As voluntary settlements are usually mere matters of bounty, ordinary prudence suggests that the settlor should reserve to himself the right of making fresh arrangements; and this doctrine has, of late years, been so far recognised by Courts of Equity that, although they will not *prima facie* presume the existence of some mistake, if such a settlement is found not to contain a power of revocation, they will certainly take that circum-

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<sup>1</sup> 36 & 37 V., c. 66, § 25, subs. 3; 40 & 41 V., c. 57, § 28, subs. 3, Ir.

<sup>2</sup> *Petty v. Styward*, 1 Eq. Cas. Ab. 290.

<sup>3</sup> *Rigden v. Vallier*, 2 Ves. Sen. 252; 3 Atk. 731, S. C.

<sup>4</sup> *Harrison v. Barton*, 30 L. J., Ch. 215, per Wood, V.-C.

<sup>5</sup> *Rigden v. Vallier*, 2 Ves. Sen. 252; 3 Atk. 731, S. C.

stance into account, and consider it as entitled to some weight, in deciding on the validity of the instrument.<sup>1</sup> All parties, therefore, who rely upon an irrevocable voluntary settlement, ought to be prepared to prove, that the settlor was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended to omit it.<sup>2</sup>

§ 159. In the absence of any express stipulation to the contrary the law, since the 1st of August, 1870, has presumed, that "all rents, annuities,"—which term includes salaries and pensions,<sup>3</sup>—"dividends,"<sup>4</sup> and other periodical payments, in the nature of income, whether reserved or made payable under an instrument in writing or otherwise," accrue from day to day, like interest on money lent, and are apportionable in respect of time accordingly.<sup>5</sup> The statute, which has introduced this salutary change in the law, extends to all wills, though executed before its passing, provided that they have come into operation since that date. In a case, therefore, where a testator made his will in 1869, and died in December, 1870, the court held that the rents of his devised real estate, which were accruing due at the time of his death, must be apportioned between the devisee and the parties interested in the personal residue.<sup>6</sup> § 129

§ 160. With respect to the *execution, alteration, revocation*, and § 130

<sup>1</sup> Hall v. Hall, 42 L. J., Ch. 444; 8 Law Rep., Ch. Ap. 430, S. C., overruling the decree of Wickens, V.-C., 14 Law Rep., Eq. 365; Phillips v. Mullings, 7 Law Rep., Ch. Ap. 244. See, also, Welman v. Welman, L. R., 15 Ch. D. 570, per Malins, V.-C.

<sup>2</sup> Id.

<sup>3</sup> Treacy v. Corcoran, I. R., 8 C. L. 40; 33 & 34 V., c. 35, § 5.

<sup>4</sup> See In re Griffith, Carr v. Griffith, L. R., 12 Ch. D. 655, per Jessel, M. R.

<sup>5</sup> 33 & 34 V., c. 35, §§ 2, 7. See, also, 4 & 5 W. 4, c. 22; and 23 & 24 V., c. 154, § 49, Ir. See Jones v. Ogle, 41 L. J., Ch. 633, per Ld. Romilly; 8 Law Rep., Ch. Ap. 192, S. C.; and 42 L. J., Ch. 335, per Ld. Selborne. See, also, Capron v. Capron, 17 Law Rep., Eq. 288; 43 L. J., Ch. 677, S. C.; Re Cline's Estate, 18 Law Rep., Eq. 213; Pollock v. Pollock, 18 Law Rep., Eq. 329; 44 L. J., Ch. 168, S. C.; Hasluck v. Pedley, 44 L. J., Ch. 143; 19 Law Rep., Eq. 271, S. C.; Daly v. Att.-Gen., I. R., 8 Eq. 595; Re Cox's Trusts, 47 L. J., Ch. 735, per Hall, V.-C.; L. R., 9 Ch. D. 159, S. C.; Swansea Bk. v. Thomas, 48 L. J., Ex. 344; L. R., 4 Ex. D. 94, S. C.

<sup>6</sup> Constable v. Constable, L. R., 11 Ch. D. 681, per Fry, J.; 48 L. J., Ch. 621, S. C. See Lawrence v. Lawrence, L. R., 26 Ch. D. 795 where held by Pearson, J., that the new law extended to a case, where the testator had died before the passing of the Act, but the tenant for life had died after that date.

*construction of wills*, the courts recognise several presumptions, which it will be expedient to mention in this place.<sup>1</sup> First, it is a general rule that, on proof of the signature of the deceased, he will be presumed to have known and approved of the contents and effect of the instrument he has signed;<sup>2</sup> such knowledge and approval being essential to the validity of the will.<sup>3</sup> This presumption, however, is liable to be rebutted by showing the existence of any suspicious circumstances:<sup>4</sup> and therefore, if the testator, from want of education, or from bodily infirmity, was unable to read,<sup>5</sup> or if his capacity at the time of executing the instrument is a matter of doubt;<sup>6</sup> or if the party who is materially benefited by the will has prepared it, or conducted its execution, or has been in a position calculated to exercise undue influence;<sup>7</sup> or if the instrument itself is not consonant to the testator's natural affections and moral duties;<sup>8</sup>—a more rigid investigation will be enforced, and probate will in general not be granted, unless the court be satisfied by additional evidence, that the paper pro-

<sup>1</sup> For other presumptions respecting wills made prior to 1st Jan., 1838, see the former editions of this Work, §§ 131—134.

<sup>2</sup> *Billingham v. Vickers*, 1 Phillim. R. 191; *Fawcett v. Jones*, 3 Phillim. R. 476; *Guardhouse v. Blackburn*, 1 Law Rep., P. & D. 109; 35 L. J., Pr. & Mat. 116, S. C.; *Wheeler v. Alderson*, 3 Hagg. Ec. R. 587; *Browning v. Budd*, 6 Moo. P. C. R. 430.

<sup>3</sup> *Hastilow v. Stobie*, 35 L. J., Pr. & Mat. 18; 1 Law Rep., P. & D. 64, S. C., per Wilde, J. O., overruling a dictum of Cresswell, J. O., in *Middlehurst v. Johnson*. 30 L. J., Pr. & Mat. 14. See *Cleare v. Cleare*, 1 Law Rep., P. & D. 655; 38 L. J., Pr. & Mat. 81, S. C.

<sup>4</sup> *Von Stentz v. Comyn*, 12 Ir. Eq. R. 622, 642—645, per Brady, Ch.

<sup>5</sup> *Barton v. Robins*, 3 Phillim. R. 455, n. b; *In re Duane*, 31 L. J., Pr. & Mat. 173; 2 Swab. & Trist. 590, S. C.; *In re Wray*, I. R., 10 Eq. 286; but see *Longchamp v. Fish*, 2 N. R. 415.

<sup>6</sup> 1 Phillim. R. 193; *Ingram v. Wyatt*, 1 Hagg. Ec. R. 384; *Dodge v. Meech*, id. 620; *Dufaur v. Croft*, 3 Moo. P. C. R. 147.

<sup>7</sup> *Mitchell v. Thomas*, 6 Moo. P. C. R. 137; *Scouler v. Plowright*, 10 Moo. P. C. R. 440, 444—446; *Raworth v. Marriott*, 1 Myl. & K. 643; *Greville v. Tylee*, 7 Moo. P. C. R. 320; *Paske v. Ollat*, 2 Phillim. R. 324; *Zacharias v. Collis*, 3 id. 202; *Wheeler v. Alderson*, 3 Hagg. Ec. R. 587; *Billingham v. Vickers*, 1 Phillim. R. 187; *Fulton v. Andrew*, 7 Law Rep., H. L. 461, per Ld. Cairns, Ch.; 44 L. J., Pr. & Mat. 23, S. C.; *Durling v. Loveland*, 2 Curt. 226, 227; *Chambers v. Wood*, 2 Ec. & Mar. Cas. 485, per Ld. Cottenham; *Paine v. Hall*, 18 Ves. 475; *O'Connel v. Butler*, Milw. Ec. Ir. R. 102, 103; *Gore v. Gahagan*, id. 220.

<sup>8</sup> See *Prinsep & E. India Co. v. Dyce Sombre*, 10 Moo. P. C. R. 285.

pounded does really express the true will of the deceased.<sup>1</sup> In cases of extraordinary suspicion, it will of course be highly expedient to prove, either that instructions were given by the deceased corresponding with the actual provisions of the will, or that the instrument was, at the time of execution, read to or by the testator, or that he had expressed some subsequent knowledge and approval of its dispositions; but this precise species of evidence is not absolutely required, and it will be sufficient if, by *any* means of proof, a knowledge and approval of the contents of the will can be brought home to the deceased.<sup>2</sup>

§ 161. *Secondly*, where proof can be furnished that, prior to § 131 the execution of a will by a competent testator, it was either read over to him, or otherwise brought specially to his notice, the Probate Division of the High Court, in the absence of fraud, will not only infer, *prima facie*, that he approved of the contents, but will recognise a *conclusive* presumption to that effect. No matter what evidence may be forthcoming to establish a case of obvious error, and to show that some passage has crept into the instrument by the sheer mistake of the draughtsman, the judge will turn a deaf ear to all such testimony, and, rejoicing in the safe inflexibility of a procrustean rule, will perpetrate the grossest injustice under the protection of law.<sup>3</sup> On a recent occasion it was sought to apply this unjust doctrine to a case, where the jury had found as facts, not only that a word had been introduced into the will by a blunder, but that the clauses in which it appeared had never been brought to the notice of the testator in any way. The court, however, under these circumstances, very wisely refused to be carried any further down the facile descent, and directed that the obnoxious

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<sup>1</sup> *Browning v. Budd*, 6 Moo. P. C. R. 430; *Fulton v. Andrew*, 7 Law Rep., H. L. 448; 44 L. J., Pr. & Mat. 17, S. C.

<sup>2</sup> *Barry v. Butlin*, 1 Curt. 638—641; 2 Moo. P. C. R. 482—485, S. C.; *Mitchell v. Thomas*, 6 Moo. P. C. R. 137. See further on this subject, 1 Will. on Ex. 97, 311, 312; and *Atter v. Atkinson*, 1 Law Rep., P. & D. 665.

<sup>3</sup> *Guardhouse v. Blackburn*, 1 Law Rep., P. & D. 109, per Ld. Penzance; 35 L. J., Pr. & Mat. 116, S. C.; *Harter v. Harter*, 42 L. J., Pr. & Mat. 1, per Sir J. Hannen; 3 Law Rep., P. & D. 11, S. C. Sed qu., for the judicial reasoning in these cases is not so logical as might fairly be expected. See *In re Oswald*, 43 L. J., Pr. & Mat. 24; 3 Law Rep., P. & D. 162, S. C.

expression should be struck out of the instrument wherever it occurred.<sup>1</sup>

§ 162. *Thirdly*, when several sheets of paper, constituting a connected disposal of property, are found together, the last only being duly signed and attested as a will, the court in the absence of direct proof, and even in spite of partial inconsistencies in some of the provisions, will presume that each of the sheets so found formed a part of the will at the time of its execution.<sup>2</sup>

§ 163. *Fourthly*, in favour of attestations to wills the presumption of law is, that if the testator *might* have seen, he *did* see, the witnesses subscribe their names;<sup>3</sup> and the fact of his having been in the same room with them is *prima facie* evidence of their attestation in his presence, as an attestation not made in the same room is *prima facie* not made in his presence.<sup>4</sup>

§ 164. *Fifthly*, in the absence of any evidence to the contrary, the law presumes that all *alterations*, *interlineations*, or *erasures*, which may appear on the face of a will, were made after its execution,<sup>5</sup> and even after the execution of any codicils thereto,<sup>6</sup> and consequently the Probate Division of the High Court will, in a case of unexplained alteration or interlineation,<sup>7</sup> or erasure, grant probate of the will in its original form.<sup>8</sup> This presumption, how-

<sup>1</sup> *Morrell v. Morrell*, L. R., 7 Pr. D. 68; 51 L. J., Pr. & Mat. 49, S. C.

<sup>2</sup> *Marsh v. Marsh*, 1 Swab. & Trist. 528; *Gregory v. Queen's Proctor*, 4 Ec. & Mar. Cas. 620; *Rees v. Rees*, 3 Law Rep., P. & D. 84. See, also, *In re Catrall*, 3 Swab. & Trist. 419.

<sup>3</sup> *Todd v. Ld. Winchelsea*, 2 C. & P. 488; *M. & M.* 12, S. C., per Abbott C. J.; *Doe v. Manifold*, 1 M. & Sel. 294. See post, § 1054.

<sup>4</sup> *Neil v. Neil*, 1 Leigh, R. 6, 10—21.

<sup>5</sup> *Simmonds v. Rudall*, 1 Sim. N. S. 115, 136, 137; *Doe v. Catomore*, 16 Q. B. 745; *Doe v. Palmer*, 17 Q. B. 747; *In re Stone Jamies*, 1 Swab. & Trist. 238; *Williams v. Ashton*, 1 Johns. & Hem. 115.

<sup>6</sup> *Lushington v. Onslow*, 6 Ec. & Mar. Cas. 183, 188, per Sir H. Fust. See also *Christmas v. Whinyates*, 32 L. J., Pr. & Mat. 73; 3 Swab. & Trist. 81, S. C.

<sup>7</sup> *In re White*, 30 L. J., Pr. & Mat. 55. But see *in re Cadge*, 37 L. J., Pr. & Mat. 15. 1 Law Rep., P. & D. 543, S. C.

<sup>8</sup> *Gann v. Gregory*, 22 L. J., Ch. 1059, per Stuart V.-C.; *Cooper v. Bockett*, 4 Moo. P. C. R. 419; 4 Ec. & Mar. Cas. 685, S. C.; *Greville v. Tylee*, 7 Moo.



ever,—which is contrary to that which prevails with respect to deeds,<sup>1</sup> resolutions, and other official documents,<sup>2</sup>—may be rebutted by slight affirmative evidence,<sup>3</sup> and it will not apply to the *filling up of blanks*; and therefore, where a testator gave instructions that his will should be prepared with blanks for the amount of the legacies, and the will was found after his death regularly executed, with the amounts filled up in his own handwriting, the court presumed, in the absence of all evidence on the subject, that the blanks were filled up before the will was signed, for otherwise the execution would have been a mere idle ceremony.<sup>4</sup>

§ 165. *Sixthly*, if a will, traced to the possession of the testator, and last seen in his custody, be not forthcoming on his death, the law, under ordinary circumstances, presumes that it has been destroyed by himself, *animo cancellandi*; and this presumption, which is obviously founded on good sense, must prevail, unless there be sufficient evidence to rebut it.<sup>5</sup> The declarations of the testator, however, whether written or oral, and whether made before or at or after<sup>6</sup> the execution of the instrument, furnish, in cases

P. C. R. 320, 328; *In re Hardy*, 30 L. J., Pr. & Mat. 142. See Rules for Reg. of Ct. of Prob. in non-contentious business, Nos. 8, 9, 10.

<sup>1</sup> *Simmonds v. Rudall*, 1 Sim. N. S. 115, 136, 137; *Doe v. Catomore*, 16 Q. B. 745; 20 L. J., Q. B. 728, S. C.

<sup>2</sup> *Steevens's Hospital v. Dyas*, 15 Ir. Eq. R., N. S. 405, 420.

<sup>3</sup> See *Dench v. Dench*, 46 L. J., P. D. & A. 13; L. R., 2 P. D. 60, S. C.; *In re Duffy*, I. R., 5 Eq. 506; and *In re Sykes*, 42 L. J., Pr. & Mat. 17; 3 Law Rep., P. & D. 26, S. C.; *Moore v. Moore*, I. R., 6 Eq. 166. The presumption, moreover, has been altogether set at naught in the case of a will made by an officer in actual military service, *In re Farquharson v. Tweedale*, 44 L. J., Pr. & Mat. 35. Sed qu.

<sup>4</sup> *Birch v. Birch*, 6 Ec. & Mar. Cas. 581, per Sir H. Fust; *Greville v. Tylee*, 7 Moo. P. C. R. 327.

<sup>5</sup> *Sugden v. Ld. St. Leonards*, 45 L. J., P. D. & A. 1; S. C. id. 49, in Ct. of App.; L. R., 1 P. D. 154, S. C.; *Welch v. Phillips*, 1 Moo. P. C. R. 299, 302, per Parke, B.; *Finch v. Finch*, 38 L. J., Pr. & Mat. 78; 1 Law Rep., P. & D. 371, S. C.; *Johnson v. Lyford*, 37 L. J., Pr. & Mat. 65; 1 Law Rep., P. & D. 546, S. C.; *Podmore v. Whatton*, 3 Swab. & Trist. 449; 33 L. J., Pr. & Mat. 143, S. C.; *Dickinson v. Stidolph*, 11 Com. B., N. S. 341, 357; *Brown v. Brown*, 27 L. J., Q. B. 173; 8 E. & B. 876, S. C.; *In re Brown*, 27 L. J., Pr. & Mat. 20; 1 Swab. & Trist. 32, S. C.; *Wood v. Wood*, 1 Law Rep., P. & D. 309; *Cutto v. Gilbert*, 9 Moo. P. C. R. 143, per Dr. Lushington.

<sup>6</sup> *Sugden v. Ld. St. Leonards*, L. R., 1 P. D. 154; 45 L. J., P. D. & A. 1 & 49, S. C.; overruling *Quick v. Quick*, 33 L. J., Pr. & Mat. 146; 2 Swab. & Trist. 443, S. C.

of this nature, cogent proof of his intentions.<sup>1</sup> In the event, too, of the testator having become insane after the will was made, the burthen of proving that it was destroyed by him while he was of sound mind will lie upon the party who sets up the revocation.<sup>2</sup> Again, the finding of the will among the testator's papers, in which the signature has been cut out, raises a presumption that the mutilation was effected intentionally by the testator himself; and in such a case the will cannot be regarded as revived, though the signature has been again attached by gum to its original place, and the document, when discovered, was in that condition.<sup>3</sup> The revocation of a will by the testator was at one time considered to raise a *prima facie*, though by no means a conclusive, presumption that the testator intended to revoke every codicil to it,<sup>4</sup> but this presumption no longer prevails; and a codicil, however dependent it may be on the will, can now only be revoked in one of the methods prescribed by the Wills Act.<sup>5</sup>

§ 106. *Seventhly*, in the absence of any distinct intimation to the contrary, the law presumes that every testator considers his estate sufficient to answer the purposes to which he has devoted it by his will; and consequently, in the event of any deficiency arising in the assets, all annuities and legacies will, *prima facie*, be held to abate rateably. No doubt, this rule, like most others in the law, is open to certain exceptions; but in all cases the onus lies upon those who claim priority to furnish conclusive proof, by referring to the language employed, that the testator intended that the bequests should not stand on an equal footing.<sup>6</sup> Again,

<sup>1</sup> *Whiteley v. King*, 17 Com. B., N. S. 756; *Keen v. Keen*, 42 L. J., Pr. & Mat. 61; 3 Law Rep., P. & D. 105, S. C.; *Sugden v. Ld. St. Leonards*, L. R., 1 P. D. 154; 45 L. J., P. D. & A. 1 & 49, S. C. See, also, *Saunders v. Saunders*, 6 Ec. & Mar. Cas. 518; *Williams v. Jones*, 7 id. 106; *Patten v. Poulton*, 1 Swab. & Trist. 55; *Eckersley v. Platt*, 1 Law Rep., P. & D. 281.

<sup>2</sup> *Sprigge v. Sprigge*, 38 L. J., Pr. & Mat. 4; 1 Law Rep., P. & D. 608, S. C.

<sup>3</sup> *Bell v. Fothergill*, 2 Law Rep., P. & D. 148.

<sup>4</sup> *Grimwood v. Cozens*, 2 Swab. & Trist. 364; *In re Dutton*, 32 L. J., Pr. & Mat. 137; 3 Swab. & Trist. 66, S. C.; *Medlycott v. Assheton*, 2 Add. 229; *Clogstown v. Walcot*, 5 Ec. & Mar. Cas. 523. But see, *In re Ellice*, 33 L. J., Pr. & Mat. 27; *Black v. Jobling*, 1 Law Rep., P. & D. 685; 38 L. J., Pr. & Mat. 74, S. C.

<sup>5</sup> *Re Turner*, 2 Law Rep., P. & D. 403, per Ld. Penzance.

<sup>6</sup> *Miller v. Huddleston*, 3 M. & Gord. 513, 523, 524, per Ld. Truro; *Brown* (3048)

property specifically bequeathed or devised is *prima facie* presumed to have been intended by the testator to pass to the legatee or devisee in its entirety; and this presumption will not be rebutted by a codicil, charging certain pecuniary legacies on *all* the testator's estates, both real and personal.<sup>1</sup> If, too, an annuity be bequeathed by will for an indefinite period, the law will presume, in the first instance, that it was intended to be given for the life of the annuitant; but this presumption is liable to be rebutted by proof, that the testator has used words which indicate an intention that the annuity should be granted, either in perpetuity, or for a fixed number of years.<sup>2</sup>

§ 167. When a legacy is bequeathed to a person, who is also § 136A named in the will as an executor, the law presumes, *prima facie*, that it was given to him in that character; and consequently, if he declines to accept the office, he must relinquish all claim to the legacy, unless he can show from the language employed that the bequest was made to him independently of his character of executor, and solely as a token of personal regard.<sup>3</sup> When, under the terms of a will, the consent of executors or trustees is rendered necessary to the validity of any act, the law presumes, in the absence of any express direction on the subject, that this discretionary power should be exercised by those only who undertake the duties of the office.<sup>4</sup> An executor who has renounced, or a

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<sup>\*</sup> Brown, 1 Keen, 275, 277; *Thwaites v. Foreman*, 1 Coll. 409, 414; *Ld. Dunboyne v. Brander*, 18 Beav. 313.

<sup>1</sup> *Conron v. Conron*, 7 H. of L. Cas. 168; *Campbell v. M'Conaghey*, 1 R., 6 Eq. 20.

<sup>2</sup> *Yates v. Maddan*, 3 M. & Gord. 532; *Lett v. Randall*, 2 Sm. & Giff. 83; 2 De Gex, F. & J. 389, S. C.; *Stokes v. Heron*, 12 Cl. & Fin. 161; *Potter v. Baker*, 13 Beav. 273; *Blewitt v. Roberts*, Cr. & Ph. 274; *Hill v. Potts*, 31 L. J., Ch. 380, per Wood, V.-C.; S. C. nom. *Hill v. Ratley*, 2 Johns. & Hem. 634; *Sullivan v. Galbraith*, 1 R., 4 Eq. 582.

<sup>3</sup> *Stackpole v. Howell*, 13 Ves. 421; *In re Reeve's Trusts*, L. R., 4 Ch. D. 841, per Jessel, M. R.; *Harrison v. Rowley*, 4 Ves. 216; *Reed v. Devaynes*, 2 Cox, Ch. R. 285; 3 Br. C. C. 95, S. C.; *Dix v. Reed*, 1 Sim. & St. 239; *Piggott v. Green*, 6 Sim. 72; *Jewis v. Lawrence*, 8 Law Rep., Eq. 345; *In re Banbury's Trust's*, 1 R., 10 Eq. 408; *In re Reeve's Trusts*, 46 L. J., Ch. 412, per Jessel, M. R.; L. R., 4 Ch. D. 841, S. C.

<sup>4</sup> *White v. M'Dermott*, 1 R., 7 C. L. 1.

trustee who has disclaimed, has obviously no right to interfere in the matter ; and even without any formal renunciation or disclaimer an executor or trustee, who simply declines to accept the office or to act in the trusts, will thereby relieve the parties interested from the responsibility of obtaining his consent.<sup>1</sup> When executors are appointed by will, and the residuary estate is undisposed of, the law presumes, in the absence of evidence of an intention to the contrary, that the executors are trustees for the next of kin ;<sup>2</sup> but if there be no next of kin, as where the testator is illegitimate, the presumption then is, that the executors may retain the property for their own use instead of its becoming forfeited to the Crown.<sup>3</sup> On the subject of emblements, which is the old technical term, “*emblavence de blet*,” for the profits of the growing crop,—the courts recognise a very capricious presumption ;<sup>4</sup> for although the personal representatives of a man dying seised in fee of land are entitled to the emblements in preference to the heir, the law presumes, in the event of a devise of the land, that the testator intended them to pass to the devisee.<sup>5</sup> This presumption may of course be rebutted by a specific bequest of the growing crops, or “farming stock,”<sup>6</sup> to another party ; but the title of the devisee to them will not, it seems, be ousted by a mere disposition of all the testator’s personal estate.<sup>7</sup>

§ 168. When the word “children” is used in a will, the law presumes, *prima facie*,—as it does when the same word is employed in the Statute of Distributions,<sup>8</sup>—that the term is limited to such children as are legitimate according to the law of England ; and so strong is this presumption that it will be regarded as conclusive, unless there be something in the will itself to show clearly an in-

<sup>1</sup> *White v. M'Dermott*, 1 R., 7 C. L. 1.

<sup>2</sup> 11 G. 4 & 1 W. 4, c. 40.

<sup>3</sup> *In re Knowles*, 49 L. J., Ch. 625, per Malins, V.-C.

<sup>4</sup> *West v. Moore*, 8 East, 343, per Ld. Ellenborough.

<sup>5</sup> *Cooper v. Woolfitt*, 26 L. J., Ex. 310.

<sup>6</sup> *Evans v. Williamson*, 50 L. J., Ch. 197, per Jessel, M. R. ; L. R., 17 Ch. D. 696, S. C.

<sup>7</sup> *Cooper v. Woolfitt*, 26 L. J., Ex. 310.

<sup>8</sup> 22 & 23 Car. 2, c. 10 ; *In re Goodman's Trusts*, L. R., 14 Ch. D. 619, per Jessel, M. R. ; 49 L. J., Ch. 805, S. C. But this case has been reversed by *Cotton and James, Ld. Js.*, in Ct. of Ap., diss. Lush, L. J., 50 L. J., Ch. 425 ; L. R., 17 Ch. D. 226, S. C. Therefore qu.

tention on the part of the testator to provide for natural children.<sup>1</sup> In this last event, such a child, though *en ventre sa mère* at the date of the will, has been held to be included in the term.<sup>2</sup> Again, the word "cousins," when used in a will, has been interpreted to mean first cousins only; "first cousins" have *prima facie* been defined as cousins german or persons having the same grandfathers; and "second cousins" have been held to mean persons having the same great-grandfathers.<sup>3</sup> Neither of these last two terms will, in the absence of an evident intention,<sup>4</sup> be construed as including the children or grandchildren of first cousins, who are commonly called first cousins once or twice removed.<sup>5</sup> So, when a testator uses the word "family" he will be presumed, *prima facie*, to mean the children, if any, of the person whose family is spoken of, and there must be a special context to give the word a different meaning.<sup>6</sup> So, also, the word "moneys," when used in a testamentary instrument, will, in the absence of anything in the instrument to indicate a different intention,<sup>7</sup> be confined to ready money actually in hand;<sup>8</sup> and the word "furniture"—unless under special circumstances<sup>9</sup>—will not include tenant's fixtures.<sup>10</sup> Neither will the term "debentures" include "debenture stock."<sup>11</sup> Again, the term "unmarried" will, unless otherwise explained by the context, be held to mean "without ever having been married,"<sup>12</sup>

<sup>1</sup> *Dorin v. Dorin*, 7 Law Rep., H. L. 568; 45 L. J., Ch. 652, S. C., per Dom. Proc.; *Ellis v. Houstoun*, L. R., 10 Ch. D., 236; *Boyes v. Bedale*, 1 Hem. & M. 798; *Megson v. Hindle*, L. R., 15 Ch. D. 198, per Ct. of App. See *Laker v. Hordern*, L. R., 1 Ch. D. 644.

<sup>2</sup> *Crook v. Hill*, L. R., 3 Ch. D. 773, per Hall, V.-C.

<sup>3</sup> *Re Parker, Bentham v. Wilson*, L. R., 15 Ch. D. 528, per Jessel, M. R.; S. C. *affd.* on app., L. R., 17 Ch. D. 262; and 50 L. J., Ch. 639.

<sup>4</sup> *Re Bonner, Tucker v. Good*, L. R., 19 Ch. D. 201, per Chitty, J.; 51 L. J., Ch. 83, S. C.

<sup>5</sup> *Re Parker, Bentham v. Wilson*, L. R., 15 Ch. D. 528, per Jessel, M. R.; S. C. *affd.* on app. L. R., 17 Ch. D. 262; and 50 L. J., Ch. 639.

<sup>6</sup> *Pigg v. Clarke*, 45 L. J., Ch. 849, per Jessel, M. R.

<sup>7</sup> See *Re Cadogan, Cadogan v. Palagi*, L. R., 25 Ch. D. 154; 53 L. J., Ch. 207, S. C.

<sup>8</sup> *Langdale v. Whitfield*, 4 Kay & J. 426, 432, per Wood, V.-C.; *Williams v. Williams*, L. R., 8 Ch. D., 789, 793, per Baggallay, L. J.; 47 L. J., Ch. 857, 858, S. C.

<sup>9</sup> *Paton v. Sheppard*, 10. Sim. 186.

<sup>10</sup> *Finney v. Grice*, L. R., 10 Ch. D. 13, per Jessel, M. R.

<sup>11</sup> *Lane*, in re, L. R., 14 Ch. D. 856.

<sup>12</sup> *Dalrymple v. Hall*, L. R., 16 Ch. D. 715; 50 L. J., Ch. 302, S. C.

§ 169. It may be laid down as a general *prima facie* presumption, that all documents were made on the day they bear date.<sup>1</sup> This presumption prevails, whether the document be a modern or ancient deed,<sup>2</sup> a bill of exchange or promissory note,<sup>3</sup> an account,<sup>4</sup> or even a letter;<sup>5</sup> and, that, too, whether it be written by a party to the suit or not.<sup>6</sup> The rule, however, has been very reluctantly recognised, at least by some distinguished judges,<sup>7</sup> and it is certainly subject to two exceptions.<sup>8</sup> The first is, where, in order to prove a petitioning creditor's debt, an instrument is put in signed by the bankrupt, which bears date before the act of bankruptcy. In these cases, as the effect of a proceeding in bankruptcy is retrospective,<sup>9</sup> and its object is to invalidate all transactions which have taken place between the act of bankruptcy and the time when the adjudication takes effect; and as, moreover, it is the interest of the petitioning creditor to support the adjudication, the court has felt a reasonable jealousy of a collusion between him and the bankrupt, and has, accordingly, required that some independent proof of the existence of the instrument, previous to the act of bankruptcy, should be given in evidence, beyond the mere date apparent on its face.<sup>10</sup> The second exception is, where, in petitions for damages on the ground

<sup>1</sup> *Malpas v. Clements*, 19 L. J., Q. B. 435; *Fotez v. Glossop*, 2 Ex. R. 191; *Morgan v. Whitmore*, 6 Ex. R. 716.

<sup>2</sup> *Anderson v. Weston*, 6 Bing. N. C. 300, 301; *Davies v. Lowndes*, 7 Scott, N. S. 214; 6 M. & Gr. 527, 528, S. C.; *Doe v. Stillwell*, 8 A. & B. 645; *Smith v. Battens*, 1 M. & Rob. 341.

<sup>3</sup> 45 & 46 V., c. 61, § 3; *Anderson v. Weston*, 6 Bing. N. C. 296; 8 Scott, 583, S. C.; *Smith v. Battens*, 1 M. & Rob. 341.

<sup>4</sup> *Sinclair v. Baggaley*, 4 M. & W. 312.

<sup>5</sup> *Potez v. Glossop*, 2 Ex. R. 191; *Lewis v. Simpson*, and *Angell v. Worsley*, id. 196, n.; *Hunt v. Massey*, 5 B. & Ad. 902; *Goodtitle v. Millburn*, 2 M. & W. 853.

<sup>6</sup> *Potez v. Glossop*, 2 Ex. R. 191; *Anderson v. Weston*, 6 Bing. N. C. 301, per *Bosanquet, J.*

<sup>7</sup> *Potez v. Glossop*, 2 Ex. R. 191. See, also, *Butler v. Mountgarret*, 7 H. of L. Cas. 646, 647, per *Ld. Wensleydale*.

<sup>8</sup> See also, re *Adamson*, L. R., 3 P. & D. 253.

<sup>9</sup> 46 & 47 V., c. 52, § 43.

<sup>10</sup> *Anderson v. Weston*, 6 Bing. N. C. 301, 302, per *Bosanquet, J.*; *Sinclair v. Baggaley*, 4 M. & W. 318, per *Ld. Abinger*; *Hoare v. Coryton*, 4 Taunt. 560; *Wright v. Lainson*, 2 M. & W. 739, 743. These cases overrule *Taylor v. Kinlock*, 1 Stark. R. 175.

of adultery,<sup>1</sup> letters are put in evidence to show the terms on which the husband and wife were living before the seduction; and here, in order to avoid the obvious danger of collusion, it has been deemed necessary that some independent proof should be given that the letters were written at the time they bear date.<sup>2</sup> It may be questionable whether the courts would not *now* recognise a *third exception* to the rule in those cases, where indorsements made by a deceased obligee on a bond, acknowledging the receipt of interest, are tendered in evidence by his assignee, with the view of defeating a plea of the Statute of Limitations, set up by the obligor.<sup>3</sup>

§ 170. Subject to the above exceptions, the rule in question is § 138 founded on common reason; for in the very great majority of cases, documents are actually written on the day they bear date. The doctrine, however, must not be pushed too far; and in applying it to bills of exchange, it must be borne in mind that the date of the bill, though *prima facie* evidence of the day when it was drawn, is no proof that it was *accepted* at the same time. The most that the law will presume is that a bill was accepted before its maturity, and within a reasonable time after it was drawn; and it recognises that presumption, because in all ordinary transactions such a course of business would be pursued.<sup>4</sup>

§ 171. The fact that a person has *acted in an official capacity* § 139 is also presumptive evidence of his due appointment to the office, because it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorised to fill. This rule has been expressly adopted by the legis-

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<sup>1</sup> See 20 & 21 V., c. 85, § 33.

<sup>2</sup> *Trelawney v. Coleman*, 2 Stark. R. 193, per Holroyd, J.; *Houliston v. Smyth*, 2 C. & P. 24, per Best, C. J.

<sup>3</sup> See this question discussed, post, §§ 690—696.

<sup>4</sup> *Roberts v. Bethell*, 12 Com. B. 778, questioning *Israel v. Argent*, and *Blyth v. Archbold*, cited in *Pears. Chit. Pl.* 330, n. b. See 45 & 46 V., c. 61. § 13.

lecture in the statutes relating to the excise<sup>1</sup> and customs,<sup>2</sup> and at common law it has been held applicable to lords of the treasury,<sup>3</sup> masters in chancery, though exercising special powers,<sup>4</sup> deputy county court judges,<sup>5</sup> commissioners for taking affidavits,<sup>6</sup> surrogates,<sup>7</sup> sheriffs,<sup>8</sup> under-sheriffs,<sup>9</sup> justices of the peace,<sup>10</sup> constables,<sup>11</sup> though appointed by commissioners under a local public Act,<sup>12</sup> trustees under a turnpike Act,<sup>13</sup> churchwardens,<sup>14</sup> overseers,<sup>15</sup> vestry-clerks,<sup>16</sup> trustees empowered to raise church-rates under a local Act,<sup>17</sup> weigh-masters of market towns,<sup>18</sup> attested soldiers engaged in

<sup>1</sup> 7 & 8 G. 4, c. 53, § 17, enacts, that "if upon the trial of any indictment, information, action, suit, or prosecution whatsoever, or in any other legal or judicial proceeding, any question shall be made, or any doubt or dispute shall arise, touching or concerning the keeping of any office of excise, or whether any person is or was a commissioner or assistant commissioner of excise, or a collector or other officer of excise, or commissioned or appointed to act as such, evidence of the actual keeping of such office of excise, or that such person is, or at the time in question was, reputed to be such commissioner or assistant commissioner, or such collector or other officer, or does or did then act as such commissioner or assistant commissioner, or as such collector or other officer so commissioned and appointed (as the case may require), shall in every such case be admitted and deemed and taken to be respectively sufficient and legal proof of such facts respectively, without producing or proving the particular commission, appointment or other authority, whereby such person is or was commissioned or appointed to be such commissioner or assistant commissioner, or such collector or other officer as aforesaid, unless by other evidence the contrary be made to appear; any law, custom, or usage to the contrary therefore notwithstanding."

<sup>2</sup> 39 & 40 V., c. 36, § 261, enacts, that "if upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, or coast-guard duly employed for the prevention of smuggling, or an officer of customs or excise, his own evidence thereof, or other evidence of his having acted as such, shall be deemed sufficient, without production of his commission or deputation.

<sup>3</sup> R. v. Jones, 2 Camp. 131, per Ld. Ellenborough.

<sup>4</sup> Marshall v. Lamb, 5 Q. B. 115.

<sup>5</sup> R. v. Roberts, 14 Cox, 101, by Ct. of Crim. App.

<sup>6</sup> R. v. Howard, 1 M. & Rob. 187, per Patteson, J.; R. v. Newton, 1 C. & Kir. 480.

<sup>7</sup> R. v. Verelst, 3 Camp. 432, per Ld. Ellenborough.

<sup>8</sup> Bunbury v. Matthews, 1 C. & Kir. 382, per Parke, B.

<sup>9</sup> Doe v. Brawn, 5 B. & A. 243. See Plumer v. Brisco, 11 Q. B. 46; Robinson v. Collingwood, 17 Com. B., N. S. 777.

<sup>10</sup> Berryman v. Wise, 4 T. R. 366, per Buller, J.

<sup>11</sup> Id.

<sup>12</sup> Butler v. Ford, 1 C. & M. 662.

<sup>13</sup> Pritchard v. Walker, 3 C. & P. 212.

<sup>14</sup> R. v. Mitchell, per Abbott, C. J., cited 2 St. Ev. 307, n. r.

<sup>15</sup> Doe v. Barnes, 8 Q. B. 1037.

<sup>16</sup> M'Gahey v. Alston, 2 M. & W. 206.

<sup>17</sup> R. v. Murphy, 8 C. & P. 310, per Coleridge, J.

<sup>18</sup> M'Mahon v. Lennard, 6 H. of L. Cas. 970; Dexter v. Hayes, 11 Ir. Law R., N. S. 106; S. C. in Ex. Ch. nom. Hayes v. Dexter, 13 id. 22; M'Mahon v. Ellis, 14 id. 499, 509.



the recruiting service,<sup>1</sup> and, indeed, it extends to all public officers.<sup>2</sup> Moreover, no distinction is recognised, though the appointment must necessarily be in writing,<sup>3</sup> or even under seal,<sup>4</sup> or though the action be brought in the name of the officer,<sup>5</sup> or though the title be directly put in issue by the pleading,<sup>6</sup> or though the proceedings be criminal, and in the highest degree penal, as, for instance, a trial for the murder of a constable in the execution of his duty.<sup>7</sup> Neither will any exception to this rule be allowed, even in cases where parties are indicted for offences committed by them in their character of public officers. Thus, if a person employed by the Post-office be indicted for stealing or embezzling a letter,<sup>8</sup> his formal appointment need not be proved, but it will suffice to show that he has acted in the capacity charged;<sup>9</sup> though, in an Irish case, Mr. Justice Crampton appears to have held that some proof of acting with the *sanction* of the Post-office authorities was necessary.<sup>10</sup>

§ 172. The same presumption prevails with respect to certain relations of life. Thus, the relations of landlord and tenant, of partnership, and of master and servant, are frequently presumed from the conduct of the parties being more consistent with that

<sup>1</sup> Walton v. Gavin, 16 Q. B. 48

<sup>2</sup> M'Gahey v. Alston, 2 M. & W. 211, per Parke, B; Marshall v. Lamb, 5 Q. B. 123, per Patteson, J.; Doe v. Young, 8 Q. B. 63.

<sup>3</sup> See cases cited in preceding notes to this section.

<sup>4</sup> Dexter v. Hayes, 11 Ir. Law R., N. S. 106, 119, per Fitzgerald, B., explaining Smith v. Cartwright, 6 Ex. R. 927.

<sup>5</sup> M'Gahey v. Alston, 2 M. & W. 206, 211; M'Mahon v. Lennard, 6 H. of L. Cas. 970; Doe v. Barnes, 8 Q. B. 1037, which was an action of ejectment brought by parish officers; Cannell v. Curtis, 2 Bing. N. C. 228; 2 Scott, 379, S. C. This last case was an action for libel; the declaration averred that the plaintiff *had been appointed* and was assistant overseer; the plea traversed the appointment. Tindal, C. J., intimated a strong opinion that it was only necessary for the plaintiff to prove that he *acted* as assistant overseer. This ruling was cited by Parke, B., in 2 M. & W. 209.

<sup>6</sup> Dexter v. Hayes, 11 Ir. Law R., N. S. 103; S. C. nom. Hayes v. Dexter, 13 Ir. Law R., N. S. 22, per Ex. Ch.; M'Mahon v. Lennard, 6 H. of L. Cas. 1000.

<sup>7</sup> R. v. Gordon, 1 Lea. 515.

<sup>8</sup> See 7 W. 4 & 1 V., c. 36, §§ 25, 26.

<sup>9</sup> Clay's case, 2 East, P. C. 580; R. v. Rees, 6 C. & P. 606, per Parke, B.; R. v. Barrett, id. 124, per Little Dale and Bosanquet, Js., and Bolland, B.; R. v. Townsend, C. & Marsh. 178; R. v. Goodwin, 1 Lew. C. C. 100.

<sup>10</sup> R. v. Trenwyth, Ir. Cir. R. 172. Sed qu.?

state of things than with any other.<sup>1</sup> So, a presumption in favour of the relation of master and apprentice has more than once been recognised, from the fact of the parties having acted towards each other as they would have done in the case of an apprenticeship, though no direct proof was given of the existence of any indenture.<sup>2</sup> So, also, a cogent legal presumption is raised in favour of the validity of any marriage which is shown to have been celebrated *de facto*;<sup>3</sup> and this presumption will not be rebutted, in the case of a minor married by licence in her father's lifetime, by the mere fact of the mother's name appearing in the register as the consenting party, and no evidence being adduced to establish the consent of the father.<sup>4</sup> So, if persons live together ostensibly as man and wife the law will, in favour of morality and decency, presume that they are legally married;<sup>5</sup> and so far has this presumption been recognised in Scotland, that even where the connexion was shown to have commenced in adultery, a subsequent valid marriage has been inferred from strong evidence of habit and repute.<sup>6</sup> Two exceptions to this rule are, however, recognised in England; for on an indictment for bigamy,<sup>7</sup> so far

<sup>1</sup> *R. v. Fordingbridge*, E. B. & E. 685, per Erle, J.

<sup>2</sup> *R. v. Fordingbridge*, E. B. & E. 678; *R. v. St. Marylebone*, 4 D. & R. 475.

<sup>3</sup> *Piers v. Piers*, 2 H. of L. Cas. 331; *Sichel v. Lambert*, 15 Com. B., N. S. 781; *Sastry Velaider v. Sembecutty*, L. R., 6 App. Cas. 364, per Pr. C. See *Harrod v. Harrod*, 1 K. & J. 4. Also, ante, § 144.

<sup>4</sup> *Harrison v. Corp. of Southampton*, 22 L. J., Ch. 722.

<sup>5</sup> *Doe v. Fleming*, 4 Bing. 266; *Goodman v. Goodman*, 28 L. J., Ch. 1; *Collins v. Bishop*, 48 L. J., Ch. 31, per Malins, V.-C.; *Sastry Velaider v. Sembecutty*, L. R. 6, App. Cas. 364, per Pr. C. The same presumption is recognised by the Mahomedan law, *Ranee Khujooroonissa v. Mussamut Roushun Jehan*, L. R., 3 Ind. App. 291, 311; and by the Roman Dutch Law as prevailing in Ceylon, *Aronegary v. Sambonade*, 50 L. J., Pr. C. 28.

<sup>6</sup> The *Brendalbane Case*, 1 Law Rep., H. L., Sc. 182; explaining, or, perhaps, as some may think, *explaining away*, *Cunningham v. Cunningham*, 2 Dow, 483; and *Lapsley v. Grierson*, 1 H. of L. Cas. 498. See, also, *Lyle v. Ellwood*, 44 L. J., Ch. 164, per Hall, V.-C.; 19 Law Rep., Eq. 98, S. C.; *De Thoren v. Att.-Gen.*, L. R., 1 App. Cas. 686; and *Dysart Peer.*, L. R., 6 App. Cas. 489.

<sup>7</sup> 24 & 25 V., c. 100, § 57. See *R. v. Griffin*, 14 Cox, 308; 4 L. R. Ir. 497, S. C., where it was held in Ireland by four judges against two, that in a case of bigamy a marriage in accordance with Roman Catholic rites in a foreign State might be presumed to be good without proof of the law of that State. Sed qu.

as the first<sup>1</sup> marriage is concerned, and on a petition claiming damages against an alleged adulterer,<sup>2</sup> an actual marriage must be proved, and even the proof of a ceremony, which the parties supposed to be sufficient to constitute the relation of husband and wife, is not enough, but it must be shown to be sufficient according to law for that purpose.<sup>3</sup> These exceptions rest on the ground, that such proceedings, being of a penal nature, require the strictest proof; and a further reason for the exception in cases of adultery seems to be, to prevent parties from setting up pretended marriages for evil purposes.<sup>4</sup>

§ 173. How far the presumption derivable from *acting* applies to corporate bodies, or to persons suing or being sued as professional men, or as filling particular situations, does not distinctly appear. In the case of *R. v. Langton*,<sup>5</sup> parol evidence that a limited company had acted as such was held sufficient, without strict proof of incorporation, to support an indictment, which charged the accused with obtaining the goods of the company by false pretences; but here it must be noted, that, by virtue of § 88 of the statute 24 & 25 V., c. 96, no allegation of ownership was necessary in that indictment. In an action against a clergyman for non-residence, Lord Mansfield held that the plaintiff was not bound to prove the admission, institution, and induction of the defendant, but that it was sufficient to show that he had received tithes and acted as the incumbent of the parish.<sup>6</sup> So, where a solicitor brought an action of defamation

<sup>1</sup> The second marriage need not be such as would be binding in law, if it were not bigamous; e.g., a widower may be convicted of bigamy, if, having a second wife living, he has gone through the ceremony of marriage with a niece of his first wife; *R. v. Allen*, 1 Law Rep., C. C. 367; 41 L. J., M. C. 97; 12 Cox, 193, S. C.; overruling *R. v. Fanning*, 17 Ir. Law R., N. S. 289; 10 Cox, 411, S. C.

<sup>2</sup> 20 & 21 V., c. 85, § 33.

<sup>3</sup> *Catherwood v. Caslon*, 13 M. & W. 261, 265, per Parke, B.; *Burt v. Burt*, 29 L. J., Pr. & Mat. 133. But see *Rooker v. Rooker & Newton*, 33 L. J., Pr. & Mat. 42, per Wilde, J. O. See, also, *Patrickson v. Patrickson*, 35 L. J., Pr. & Mat. 48; 1 Law Rep., P. & D. 86, S. C.; and cases cited ante, p. 164, n. <sup>1</sup> & <sup>2</sup>.

<sup>4</sup> *Morris v. Miller*, 4 Burr. 2057; 1 W. Bl. 632, S. C.; *Birt v. Barlow*, 1 Doug. 171, 174, per Ld. Mansfield.

<sup>5</sup> 13 Cox, 349, per Ct. of Cr. App.; 46 L. J., M. C. 136; & L. R., 2 Q. B. D. 296, S. C.

<sup>6</sup> *Bevan v. Williams*, 3 T. R. 635, n. a.

against a party for slandering him in his profession, by threatening to strike him off the rolls for misconduct, he was allowed to recover damages, on proof that he had acted as a solicitor, without showing his due admission and enrolment.<sup>1</sup> So, in an action for penalties under the Post-horse Act, brought by the plaintiff as farmer-general, proof of his appointment was dispensed with as against the defendant, who had previously accounted with him in that capacity;<sup>2</sup> and,—not to multiply instances,—the same laxity of evidence has several times been allowed in actions brought by surgeons<sup>3</sup> and solicitors for their fees, and by parsons for their tithes.<sup>4</sup> But these cases appear to rest not so much, if indeed at all, upon the presumption now under discussion, as on the ground that the opposite party had, by his admissions, either by word or deed, rendered it unnecessary to prove the actual appointment.<sup>5</sup> In cases, therefore, where no such admission has been made, the safer, if not the necessary, course will be to prove the appointment in the ordinary manner; and, indeed, this seems consistent with modern practice and with the latest decisions.

§ 174. Thus, in an action brought by a physician for defamation, § 142 where the slanderous words *denied* that the plaintiff was a doctor of medicine, proof that he had acted as such, coupled with evidence of a Scotch diploma, was held insufficient to entitle him to a verdict;

<sup>1</sup> Berryman v. Wise, 4 T. R. 366.

<sup>2</sup> Radford v. M'Intosh, 3 T. R. 632.

<sup>3</sup> Gremaire v. Le Clerk Bois Valon, 2 Camp. 144. In that case the plaintiff had performed several surgical operations for the defendant, but it was contended that he could not maintain the action, as he was not a member of the College of Surgeons. He recovered a verdict, and the court discharged a rule to set it aside, as no proof had been given that the plaintiff was *not* duly licensed. See Cope v. Rowlands, 2 M. & W. 160. But see 21 & 22 V., c. 90, § 32, which has since rendered it necessary for a medical man, when suing for his charges, to prove his due registration. The same law *now* applies to dentists, 41 & 42 V., c. 33, § 5.

<sup>4</sup> Radford v. M'Intosh, 3 T. R. 632; Berryman v. Wise, 4 T. R. 367, per Buller, J. See Green v. Jackson, Pea. R. 236.

<sup>5</sup> See per Chambre, J., in Smith v. Taylor, 1 N. R. 210—212; also the judgment of Heath, J., who observes—"It seems to me that where a defendant, in the course of the transaction on which the action is founded, has *admitted* the title by virtue of which the plaintiff sues, it amounts to *prima facie* evidence that the plaintiff is entitled to sue." Id. p. 208.

and Lord Denman observed, "No doubt a person complaining of a slander upon him in a particular character, must prove that he possesses that character, when the slander does not admit it."<sup>1</sup> In this case, however, the question, whether acting as a physician is sufficient *prima facie* proof of being one, was not directly decided, because the plaintiff, not content with resting his case on such evidence, proceeded to prove that he had received the degree of doctor of medicine from the University of St. Andrews; and as the court held that this did not entitle him to practice in England, he could not, of course fall back upon proof of practice, on the legality of which he himself had, by his evidence, thrown doubt.

§ 175. In another action of slander, brought by a collector of tolls, the plaintiff was nonsuited on failing to prove his appointment to that office, but it does not appear that any evidence was offered that he ever acted in that capacity;<sup>2</sup> and the same observation applies to the cases of *Savage v. —*,<sup>3</sup> and of *Cortis v. Kent Waterworks Co.*,<sup>4</sup> in the former of which the plaintiff, who sued as a barrister, relied, not on his practice, but on the book of the Society of Lincoln's-inn, containing the order for his call; and in the latter, a party, suing in the character of treasurer to certain commissioners, proved his appointment to the office. Still, these cases, though not direct authorities, tend to show what the practice has been, and so far support the view that the rule which renders evidence of acting *prima facie* proof of due appointment, is confined to cases where the parties occupy a *public* situation, or, perhaps, where the question of appointment is *not directly* in issue. The

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<sup>1</sup> *Collins v. Carnegie*, 1 A. & E. 695, 703; 3 N. & M. 703, S. C.; *Pickford v. Gutch*, 8 T. R. 305, n. a, per Buller, J.; *Smith v. Taylor*, 1 N. R. 196. In this last case the court was equally divided on the question whether proof of acting as a physician was sufficient, but Sir J. Mansfield and Heath, J., who held the affirmative, also thought that the words of the slander—"Dr. S. has upset all that we have done, and die he (the patient) must"—implied an admission of the character, in which the plaintiff sued. It must be remembered, that in actions of this kind, where the statement of claim alleges that the plaintiff holds a certain office, or belongs to a particular profession or trade, no evidence is required to support this statement, unless it be distinctly denied in the statement of defence. Rules of Sup. Ct., 1883, Ord. xix., r. 13.

<sup>2</sup> *Sellers v. Till*, 4 B. & C. 655.

<sup>3</sup> 1 Doug. 356, n. 4.

<sup>4</sup> 7 B. & C. 314.

case of *R. v. Jones*,<sup>1</sup> where, on an indictment against an apprentice for a fraudulent enlistment, it was held that the indenture must be proved, is an authority on neither side of this question, for that decision rested on the ground, that as the *actual and legal* binding was the fact which constituted the gist of the offence, this could only be proved by the best evidence.

§ 176. Other presumptions of this class are founded upon the experience of human conduct *in the ordinary course of business*. Thus, the receipt of rent after the expiration of an old lease raises a legal presumption of a new tenancy from year to year;<sup>2</sup> though either the payer or the receiver of such rent may of course repel the presumption, by proving that the payment was made under circumstances inconsistent with it; as, for example, under the impression that the old lease was still subsisting.<sup>3</sup> So, if a tenancy from year to year be created, the law presumes that it was intended to be determinable by either party at the end of the first, as well as of any subsequent, year, unless the parties, when arranging the terms of the contract, have used expressions showing that they contemplated a tenancy for two years at least.<sup>4</sup> So, if a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he, during such permission, is presumptione juris authorized, if it should become necessary, to sue for such rent, or to prevent or recover damages in respect of any trespass or wrong relative to the property, in his own name only.<sup>5</sup> Whether, under these circumstances, the mortgagor could realize the rent by distress in his own name, is not so clear, but under the old law he could distrain for it in the mortgagee's name, and as his bailiff.<sup>6</sup> The same implied authority has also been recognised in favour of a party, to whom the mortgagor had assigned

<sup>1</sup> 1 Lea. 174.

<sup>2</sup> *Bishop v. Howard*, 2 B. & C. 100; 3 D. & R. 293, S. C.; *Doe v. Taniers*, 12 Q. B. 998; *Eccles. Commiss. v. Merrall*, 4 Law Rep., Ex. 162; 38 L. J., Ex. 93, S. C. In these last two cases the lessors were a corporation.

<sup>3</sup> *Doe v. Crago*, 6 Com. B. 90

<sup>4</sup> *Doe v. Smaridge*, 7 Q. B. 957. See *Brown v. Symons*, 29 L. J., C. P. 251; *Langton v. Carleton*, 9 Law Rep., Ex. 57; 43 L. J., Ex. 54, S. C.

<sup>5</sup> 36 & 37 V., c. 66, § 25, sub. 5; 40 & 41 V., c. 57, § 28, sub. 5, Ir.

<sup>6</sup> *Trent v. Hunt*, 9 Ex. R. 24, per Alderson, B.

his equity of redemption.<sup>1</sup> Again, in actions of trover, the jury will be advised, if not directed, to presume a conversion from unexplained evidence of a demand and refusal.<sup>2</sup>

§ 176A. The question whether the paying off of a mortgage will keep it alive or extinguish it, depends upon the intention of the parties; but in the absence of any *express* intention, equity will raise a presumption in favour of that intention, which, under the circumstances of the case, would be most advantageous to the party paying. Thus, if a mortgage be paid off by a tenant for life, he will, as stated in another place,<sup>3</sup> be presumed to have intended to retain the benefit of it against the inheritance; but if the owner of an estate in fee or in tail pays off a charge, a contrary presumption will be recognized, and the mortgage will be destroyed.<sup>4</sup>

§ 177. If a servant be hired generally, without any stipulation as to time, the law presumes the hiring to have been for a year, unless there are circumstances tending to rebut this presumption;<sup>5</sup> as, for instance, the existence of an agreement to pay weekly or monthly wages, coupled with the absence of any other stipulation showing an intention that the service should continue for a longer period than a week or a month.<sup>6</sup> This rule applies to domestic as well as to farm servants; but there is this difference between the two classes, that the service of the former, unlike that of the latter,<sup>7</sup> may be determined by a month's warning or on payment of a month's wages.<sup>8</sup> § 145

<sup>1</sup> *Snell v. Finch*, 32 L. J., C. P. 117; 13 Com. B., N. S. 651, S. C.

<sup>2</sup> *Counce v. Spanton*, 7 M. & Gr. 903; *Stancliffe v. Hardwick*, 2 C. M. & R. 1, 12; *Thompson v. Trail*, 2 C. & P. 334; 6 B. & C. 36; 9 D. & R. 31, S. C.; *Thompson v. Small*, 1 Com. B. 328; *Davies v. Nicholas*, 7 C. & P. 339; *Clendon v. Dinneford*, 5 C. & P. 13; 3 St. Ev. 1160, 1161. See *Town v. Lewis*, 7 Com. B. 608.

<sup>3</sup> *Ante*, § 154.

<sup>4</sup> *Adams v. Angell*, L. R., 5 Ch. D. 634; *Mohesh Lal v. Mohunt Bawan Das*, L. R., 10 Ind. Ap. 62, 70, 71.

<sup>5</sup> *Lilley v. Elwin*, 11 Q. B. 742, 754.

<sup>6</sup> *R. v. Worfield*, 5 T. R. 508; *R. v. St. Andrew, Pershore*, 8 B. & C. 679; *R. v. Pilkington*, 5 Q. B. 662; *Baxter v. Nurse*, 6 M. & Gr. 939, per Coltman, J.

<sup>7</sup> *Beeston v. Collyer*, 4 Bing. 313, per Gaselee, J.

<sup>8</sup> *Turner v. Mason*, 14 M. & W. 116, per Parke, B.; *Beeston & Collyer*, 4 Bing. 313, per Gaselee, J.; *Fawcett v. Cash*, 5 B. & Ad. 908, 909. *Ante*, § 34.

In the case of clerks, warehousemen, travellers, editors, reporters, actors, ushers, governesses, and the like, the law raises no inflexible presumption of an indefeasible yearly hiring from the mere fact of a hiring for an indefinite period, but in all such cases, the jury must determine the question for themselves, after weighing all the circumstances proved, and ascertaining, if possible, what usage prevails in the particular business or employment to which the hiring relates.<sup>1</sup> Again, a general promise to marry, is presumed or interpreted by the law to mean a promise to marry within a reasonable time;<sup>2</sup> and a similar construction is put upon all general contracts to do certain acts, as to discharge a cargo,<sup>3</sup> or to deliver goods and the like, where the time of completion has been left undefined by the parties.<sup>4</sup>

§ 178.<sup>5</sup> Again, as men are usually vigilant in guarding their property, prompt in asserting their rights, and diligent in claiming and collecting their dues, the law presumes, where a bill of exchange, or an order for the payment of money or the delivery of goods is found in the hands of the drawee, that he has paid the money due upon the instrument, and delivered the goods ordered.<sup>6</sup> A similar presumption is raised from the fact of a promissory note being found in the possession of the maker.<sup>7</sup> So, a receipt for the last year's or quarter's rent is *prima facie* evidence of the payment of all the rent previously accrued.<sup>8</sup> The mere delivery of money, or of a bank cheque, by one person to another, or the transfer of stock, un-

<sup>1</sup> *Baxter v. Nurse*, 6 M. & Gr. 935. 1 C. & Kir. 10 S. C. See *Holcroft v. Barber*, 1 C. & Kir. 4. *Todd v. Kerrick*, 8 Ex. R. 151; *Parker v. Ibbetson*, 4 Com. B., N. S. 348; *Fairman v. Oakford*, 5 H. & N. 635.

<sup>2</sup> *Potter v. Deboos*, 1 Stark. R. 82, per Ld. Ellenborough; *Atchinson v. Baker*, Pea. Add. Cas. 104, per Ld. Kenyon.

<sup>3</sup> *Postlethwaite v. Freeland*, L. R., 5 App. Cas. 599, per Dom. Proc.; 49 L. J., Ex. 630, S. C.

<sup>4</sup> *Ellis v. Thompson*, 3 M. & W. 456, per Alderson, R. See *Ford v. Coteworth*, 9 B. & S. 559; 5 Law Rep., Q. B., 544, S. C.; 10 B. & S. 991, S. C. in Ex. Ch. <sup>5</sup> Gr. Ev. § 38, in part.

<sup>6</sup> *Gibbon v. Featherstonhaugh*, 1 Stark. R. 225; *Egg v. Barnett*, 3 Esp. 196; *Garlock v. Geortner*, 7 Wend. 198; *Alvord v. Baker*, 9 Wend. 323; *Weidner v. Schweigart*, 9 Serg. & R. 385; *Shepherd v. Currie*, 1 Stark. R. 454.

<sup>7</sup> *Brembridge v. Osborne*, 1 Stark. R. 374.

<sup>8</sup> *Gilb. Ev.* 309; *Brewer v. Knapp*, 1 Pick. 337; 23 & 24 V., c. 154, § 47, Ir.



explained, is presumptive evidence of the payment of an antecedent debt, and not of a loan.<sup>1</sup> So, when a defendant, having money of the plaintiff in his hands, drew a cheque upon his banker in favour of the plaintiff, who had the cheque cashed at the bank, this was held to be presumptive evidence of payment, though no proof was given that the plaintiff received the cheque directly from the defendant, and it was urged that it might have passed through many other hands.<sup>2</sup>

§ 179.<sup>3</sup> Under this head may be ranked several presumptions, § 147 which are frequently made from the regular course of business in a *public office*. Thus, postmarks on letters, —when capable of being deciphered,—are *prima facie* evidence that the letters were in the post at the time and place therein specified;<sup>4</sup> and, by virtue of a special enactment, “the official mark of any sum on any postal packet as due to the Post-office, British, colonial, or foreign, in respect of that packet, shall in every part of Her Majesty’s dominions be received as evidence of the liability of such packet to the sum so marked.”<sup>5</sup> Again, if a letter properly directed<sup>6</sup> is proved to have been either put into the post-office, or delivered to the postman,<sup>7</sup> it is presumed, from the known course of business in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed.<sup>8</sup>

<sup>1</sup> Welch v. Seaborn, 1 Stark. R. 747; Breton v. Cope, Pea. R. 30; Lloyd v. Sandiland, Gow, R. 13, 16; Cary v. Gerrish, 5 Esp. 9; Aubert v. Walsh, 4 Taunt. 293; Boswell v. Smith, 6 C. & P. 60; Graham v. Cox, 2 C. & Kir. 702; Patton v. Ash, 7 Serg. & R. 115, 125.

<sup>2</sup> Mountford v. Harper, 16 M. & W. 825 per Alderson, B.

<sup>3</sup> Gr. Ev. § 40, in part.

<sup>4</sup> Fletcher v. Braddyll, 3 Stark. R. 64; R. v. Johnson, 7 East, 65; R. v. Watson, 1 Camp. 215; Archangelo v. Thompson, 2 Camp. 623; R. v. Plumer, R. & K. 264; Stocken v. Collin, 7 M. & W. 515; Butler v. Mountgarret, 6 Ir. Law R., N. S. 77; id. in Dom. Proc., 7 H. of L. Cas. 633.

<sup>5</sup> 38 & 39 V., c. 22, § 8.

<sup>6</sup> Where the address was “Mr. Haynes, Bristol,” it was held insufficient to raise this presumption, Walter v. Haynes, Ry. & M. 149, per Abbott, C. J.

<sup>7</sup> Skilbeck v. Garbett, 7 Q. B. 846.

<sup>8</sup> Sanderson v. Judge, 2 H. Bl. 509; Woodeock v. Houldsworth, 16 M. & W. 124; Dunlop v. Higgins, 1 H. of L. Cas. 381; Household Fire, &c., Ins. Co. v. Grant, 48 L. J., C. P. 577, per Ct. of App.; Bussard v. Levering, 6 Wheat. 102; Lindenberger v. Beal, id. 104; Warren v. Warren, 1 C. M. & R.

§ 120. This last presumption furnishes in most cases mere *prima facie* proof,<sup>1</sup> though in some instances it is rendered conclusive, either by rules of court, or by Act of Parliament. Thus, Order LXVII. R. 3 of the Rules of 1883, provides, that "notices sent from any office of the Supreme Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service." So, under sect. 142 of the Bankruptcy Act 1883, "all notices and other documents, for the service of which no special mode is directed, may be sent by prepaid post letter to the last known address of the person to be served therewith;"<sup>2</sup> and then by virtue of a Bankruptcy Rule,<sup>3</sup>—which, however, is curiously limited to notices of meetings of creditors,<sup>4</sup>—"an affidavit by the trustee, official receiver, or other officer of the court, or the solicitor in the matter, or by the clerk of any such person, that the notice has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed." Rules 144—148 contain special provisions regulating the service of creditor's petitions, and the proof of such service, while R. 123 establishes a similar practice with respect to bankruptcy notices, and R. 201 governs the mode of serving and proving service of petitions for administering insolvent estates. R. 82 contains a curious regulation, for it provides that, "where notice of an order or other proceeding in Court may be served by post, it shall be sent by *registered letter*."<sup>5</sup> Again, in Scotland, any summons or warrant of citation, whether of a party or a witness, or warrant of service or judicial intimation, may, in any civil action or proceeding in any Court, be executed by posting a *registered letter* duly addressed.<sup>6</sup> But, under the Companies' Clauses, the Lands' Clauses, and the Railway Clauses Consolidation Acts, summonses, notices, writs, and

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250; *Kufh v. Weston*, 3 Esp. 54; *Dobree v. Eastwood*, 3 C. & P. 250; *Wall's case*, 15 Law Rep., Eq. 18, per Malins, V.-C.; 42 L. J., Ch. 372, S. C.; *In re Hickey*, I. R., 10 Eq. 117; *Story, Bills*, § 300.

<sup>1</sup> *Reidpath's case*, 40 L. J., Ch. 39, per Ld. Romilly, M. R.

<sup>2</sup> 46 & 47 V., c. 52, § 142.

<sup>3</sup> R. 188.

<sup>4</sup> See R. 184.

<sup>5</sup> See, however, 46 & 47 V., c. 52, § 11, which relates to the service of orders staying proceedings, and is inconsistent with the above rule.

<sup>6</sup> 45 & 46 V., c. 77, §§ 3 & 4.

other proceedings, may be served upon the respective companies or promoters subject to these Acts, by being transmitted through the post as ordinary letters, so long as they are directed to their principal offices;<sup>1</sup> and a like service of notices by the company upon the shareholders will, under the first-named Act, be in general deemed sufficient.<sup>2</sup> Somewhat similar clauses are inserted in the Companies Act, 1862<sup>3</sup> in the Mines Regulation Acts of 1872,<sup>4</sup> in the Licensing Act, 1872,<sup>5</sup> in the Regulation of Railways Act, 1873,<sup>6</sup> in the Public Health Acts of 1875<sup>7</sup> for England, and 1878 for Ireland,<sup>8</sup> in the Friendly Societies Act, 1875,<sup>9</sup> in the Public Works Loans Act, 1875,<sup>10</sup> in the Agricultural (England) Holdings Act, 1883,<sup>11</sup> in the Conveyancing and Law of Property Act, 1881,<sup>12</sup> in the Patents, Designs, and Trade Marks Act, 1883,<sup>13</sup> and in a variety of other statutes.<sup>14</sup>

<sup>1</sup> 8 & 9 V., c. 16, § 135; c. 18, § 134; c. 20, § 138.

<sup>2</sup> 8 & 9 V., c. 16, § 136.

<sup>3</sup> 25 & 26 V., c. 89, §§ 62, 63.

<sup>4</sup> 35 & 36 V., c. 76, § 71; and c. 77, § 40.

<sup>5</sup> 35 & 36 V., c. 94, § 70.

<sup>6</sup> 36 & 37 V., c. 48, § 35.

<sup>7</sup> 38 & 39 V., c. 55, § 267.

<sup>8</sup> 41 & 42 V., c. 52, § 267, Ir.

<sup>9</sup> 38 & 39 V., c. 60, § 33, subs. 11; as amended by 42 V., c. 9.

<sup>10</sup> 38 & 39 V., c. 89, § 47.

<sup>11</sup> 46 & 47 V., c. 61, § 28.

<sup>12</sup> 44 & 45 V., c. 41, § 67, subs. 4.

<sup>13</sup> 46 & 47 V., c. 57, § 97.

<sup>14</sup> See 7 & 8 V., c. 33, § 6; 8 & 9 V., c. 188, § 108; 7 & 8 V., c. 101, § 72; 10 & 11 V., c. 32, § 60; 6 & 7 V., c. 18, § 100; explained in *Bishop v. Helps*, 2 Com. B. 45; *Hickton v. Antrobus*, id. 82; *Bayley v. Overseers of Nantwich*, id. 118; *Lewis v. Evans*, 44 L. J., C. P. 41; 10 Law Rep., C. P. 297; and 2 Hop & Colt. 279, S. C.; *Hornsby v. Robson*, 1 Com. B., N. S. 63; *Hannaford v. Whiteway*, 26 L. J., C. P. 75; 13 & 14 V., c. 69, §§ 113, 114, Ir. As to sending by the post notices on behalf of the Metrop. Board of Works, see 18 & 19 V., c. 120, § 221; notices relative to the proceedings of charitable institutions, see 14 & 15 V., c. 56, § 2, and 46 & 47 V., c. 36, § 43; notices under the Copyhold Acts, see 21 & 22 V., c. 94, § 20; notices under "The Endowed Schools Act, 1869," see 32 & 33 V., c. 56, § 57; notices and other documents under "The Elementary Education Act, 1870," see 33 & 34 V., c. 75, § 81; notices under "The Valuation Metropolis Act, 1869," see 32 & 33 V., c. 67, § 65; notices and other documents under "The Eccles. Dilapid. Act, 1871," see 34 & 35 V., c. 43, § 69; notices and documents under "The Explosives Act, 1875, see 38 & 39 V., c. 17, § 85; notices and documents under "The Factory and Workshop Act, 1878," see 41 V., c. 16, § 79; notices and documents under "The Dentists Act, 1878," see 41 & 42 V., c. 33, § 39; notices under "The Telegraph Act, 1878," see 41 & 42 V., c. 76, § 12; notices under "The Contagious Diseases (Animals) Act, 1878," see 41 & 42 V., c. 74, § 57; notices of injury under "The Employers' Liability Act, 1880," see 43 & 44 V., c. 42, § 7; and *Moyle v. Jenkins*, L. R., 8 Q. B. D. 116; 51 L. J., Q. B. 112, S. C.; notices and documents under "The Alkali, &c., Works Regulation

§ 180a. Again, at common law, the time of clearance of a vessel, § 147 sailing under a licence, has been presumed to have been indorsed on the licence, which was lost, upon its being shown, that without such indorsement the custom-house would not have permitted the goods to be entered.<sup>1</sup> So, on proof that goods, which cannot be exported without licence, were entered at the custom-house for exportation, a licence to export them will be presumed.<sup>2</sup>

§ 181. The like presumption is also sometimes drawn from the § 148 usual course of men's private offices and business, where the primary evidence of the fact is wanting.<sup>3</sup> Thus, the underwriters upon a foreign ship or a foreign voyage are presumed to know the usages and laws of foreign states which affect that ship or that voyage, because such knowledge is necessary for the due conduct of the business.<sup>4</sup> So, an underwriter is often presumed in fact, though not in law,<sup>5</sup> to know the contents of Lloyd's Shipping List, because this is a document, to which, in the ordinary course of his business, he has access; but this last presumption is strictly confined to cases, where the assured has made no representation inconsistent with the list, which is calculated to mislead the underwriter.<sup>6</sup> It may also be laid down as clear law, that if a man deals in a particular market, he will be taken to act according to the custom of that market; and if he directs another to make a contract at a particular place, he will be presumed to intend that the contract should be made according to the usage of that place.<sup>7</sup> Thus, if a person em-

Act, 1881," see 44 & 45 V., c. 37, § 26; notices to men enrolled in the Army Reserve, sent under the Army Act, 1881, see 44 & 45 V., c. 58, § 163, suba. F.; summonses, notices or documents requiring service under "The Corrupt and Illegal Practices Prevention Act, 1883," see 46 & 47 V., c. 51, § 62.

<sup>1</sup> *Butler v. Allnutt*, 1 Stark. R. 222.

<sup>2</sup> *Van Omeron v. Dowick*, 2 Camp. 44.

<sup>3</sup> *Doe v. Turford*, 3 B. & Ad. 890, 895; *Champneys v. Peck*, 1 Stark. R. 404; *Pritt v. Fairclough*, 3 Camp. 305.

<sup>4</sup> *Young v. Turing*, 2 M. & Gr. 603, per Ld. Abinger; 2 Scott, N. R. 752, S. C.; *Noble v. Kennoway*, 2 Doug. 513, per Ld. Mansfield.

<sup>5</sup> *Morrison v. The Universal Mar. Ins. Co.*, 42 L. J., Ex. 17.

<sup>6</sup> *Mackintosh v. Marshall*, 11 M. & W. 116.

<sup>7</sup> *Bayliffe v. Butterworth*, 1 Ex. R. 429, per Alderson, B.; 5 Rail. Cas. 288, S. C.; *Pollock v. Stables*, 12 Q. B. 765; 5 Rail. Cas. 352, S. C.; *Greaves v. Legg*, 11 Ex. R. 642; 2 H. & N. 210, S. C. in Ex. Ch., nom. *Graves v. Legg*; *Buckle v. Knoop*, 36 L. J., Ex. 49; S. C. aff. in Ex. Ch., id. 223. See post, § 1160, et seq.

employs a broker on the Stock Exchange, he impliedly authorises him to act in accordance with the rules there established, provided only that they be reasonable, or, in other words, legal;<sup>1</sup> and in such case it matters not whether the principal be himself acquainted with the rules by which such brokers are governed.<sup>2</sup> But this doctrine will not be carried too far;<sup>3</sup> and therefore where goods were shipped at Liverpool, and the bill of lading was indorsed to parties residing in New South Wales, evidence of a local usage to Liverpool, which was tendered with the view of affecting the construction of the written contract, was held to be inadmissible as against the indorsees, in the absence of proof that they were acquainted with the usage.<sup>4</sup> So, it has on several occasions been ruled that "Lloyd's" at the Royal Exchange is not a market within the rule, and that the usage there prevalent among insurance brokers, is not such a general usage as to bind merchants and shipowners unacquainted with its existence.<sup>5</sup> It may also admit of doubt, whether the doctrine would be held to apply in its full force to cases of maritime insurance, as authorities<sup>6</sup> are not wanting, which, in the language of Lord Wensleydale, "look the other way."<sup>7</sup>

§ 182. Again, if letters or notices properly directed to a gentle- § 148

<sup>1</sup> See *Pierson v. Scott*, 47 L. J., Ch. 705, per Fry, J.; L. R., 9 Ch. D. 198, S. nom. *Pearson v. Scott*.

<sup>2</sup> *Sutton v. Tatham*, 10 A. & E. 27; recognised in *Bayliffe v. Butterworth*, 1 Ex. R. 425; *Pollock v. Stables*, 12 Q. B. 765; *Bayley v. Wilkins*, 7 Com. B. 886; *Taylor v. Stray*, 2 Com. B., N. S. 175; *Hodgkinson v. Kelly*, 37 L. J., Ch. 837, per Ld. Romilly, M. R.; 6 Law Rep., Eq. 496, S. C.; *Coles v. Bristowe*, 4 Law Rep., Ch. Ap. 3; 38 L. J., Ch. 81, S. C.; *Bowring v. Shepherd*, 40 L. J., Q. B. 129; *Grissell v. Bristowe*, 38 L. J., C. P. 10; 4 Law Rep., C. P. 36, S. C. in Ex. Ch.; *Duncan v. Hill*, 40 L. J., Ex. 137; 6 Law Rep., Ex. 255, S. C. See *Merry v. Nickalls*, 7 Law Rep., Ch. Ap. 733; 41 L. J., Ch. 767, S. C.; and *Nickalls v. Merry*, 7 Law Rep., H. L. 530; and 45 L. J., Ch. 575, S. C. in Dom. Proc.

<sup>3</sup> See *Robinson v. Mollett*, 7 Law Rep., H. L. 802.

<sup>4</sup> *Kirchner v. Venus*, 12 Moo. P. C. R. 361. But see *The Steamship Co. Norden v. Dempsey*, 45 L. J., C. P. 764.

<sup>5</sup> *Sweeting v. Pearce*, 7 Com. B., N. S. 449; 9 Com. B., N. S. 534, and 30 L. J., C. P. 109, S. C. in Ex. Ch.; *Scott v. Irving*, 1 B. & Ad. 605; *Todd v. Reid*, 4 B. & A. 210; *Gabay v. Lloyd*, 3 B. & C. 793; 5 D. & R. 641, S. C.

<sup>6</sup> *Bartlett v. Pentland*, 10 B. & C. 760; *Gabay v. Lloyd*, 3 B. & C. 793.

<sup>7</sup> *Bayliffe v. Butterworth*, 1 Ex. R. 428; 5 Rail. Cas. 287, S. C.

man be left with his servant, it is only reasonable to presume, *prima facie*, that they reached his hands.<sup>1</sup> The fact, too, of sending a letter to the post-office will in general be regarded by a jury as presumptively proved, if the letter be shown to have been handed to, or left with, the clerk, whose duty it was in the ordinary course of business to carry it to the post, and if he can declare that, although he has no recollection of the particular letter, he invariably took to the post-office all letters that either were delivered to him, or were deposited in a certain place for that purpose.<sup>2</sup>

§ 183. Akin to this presumption is that which is sometimes recognised with respect to the working accuracy of certain scientific instruments. For example, a jury would be advised, in the absence of evidence to the contrary, to rely on the general correctness of a watch or a clock, which had been consulted for the purpose of fixing the time when a certain event happened. So, a thermometer would be regarded as a sufficiently safe indication of the heat of any liquid in which it had been immersed, and a pedometer might be used as evidence of the distance between two places which had been traversed by the wearer. Blood stains are every day detected by means of known chemical tests. So aneroids, anemometers, and a variety of other ingenious contrivances for detecting different matters, will occasionally play an important part as furnishing presumptive proof in Courts of Justice. In a few instances this mode of proof has been recognised by the Legislature. Thus, under "The Gas Works Clauses Act, 1871," and the Public Health Acts of 1875 for England, and 1878 for Ireland, the register of a gas or

<sup>1</sup> *Macgregor v. Kelly*, 3 Ex. R. 794. This presumption is sometimes conclusive, as, for instance, in the case of a notice to quit served at the tenant's house on one of his servants. *Tanham v. Nicholson*, 5 Law Rep., H. L. 561; 1 R., 6 C. L. 188, S. C. per Dom. Proc., reversing S. C. as reported in 1 R., 4 C. L. 185.

<sup>2</sup> *Skilbeck v. Garbett*, 7 Q. B. 846; *Hetherington v. Kemp*, 4 Camp. 193, *Trotter v. Maclean*, L. R., 13, Ch. D. 580, per Fry, J.; 49 L. J., Ch. 256, S. C.; *Ward v. Ld. Londesborough*, 12 Com. B. 252; *Spencer v. Thompson*, 6 Ir. Law R., N. S. 537, 585. So, in Scotland, "where there is proof of the regular practice of a house of business to despatch its letters in a particular manner to the post-office, it is not necessary to prove that the individual letter in question was so despatched." *Dickson*, Ev. § 6, and cases cited in n. e.

water meter "shall be *prima facie* evidence of the quantity" of gas or water consumed.<sup>1</sup>

§ 184. The law of *partnership* recognises certain presumptions, § 149 but before referring to these it will be convenient to notice one which,—contrary to former decisions,<sup>2</sup>—is no longer regarded as of binding force. Prior to the year 1860, the mere fact of participation in the net profits of a business was held, by virtue of an arbitrary presumption of law, to constitute a partnership. In *Cox v. Hickman*,<sup>3</sup> however, the House of Lords denied the existence of any such legal presumption; and the result of that decision would seem to be, that, although a right to share in the profits of trade is a strong test of partnership, and even when standing alone will justify a jury in presuming its existence, yet the question whether or not several persons are partners must in each case depend on the real intention and contract of the parties.<sup>4</sup> Turning now to the presumptions which still prevail in partnership law, it may first be noticed, that,—in the absence of any contract between partners, or any dealing from which a contract may be implied,—the common law as best interpreted both in England,<sup>5</sup> and in America,<sup>6</sup> would seem to infer,—like the civil law,<sup>7</sup>—that the business has been conducted on terms of an equal partnership; and, consequently, that each partner has a right to insist on an equal participation in profit and loss. Lord

<sup>1</sup> 34 & 35 V., c. 41, § 20; 38 & 39 V., c. 55, § 59; 41 & 42 V., c. 52, § 69, Ir.

<sup>2</sup> *Waugh v. Carver*, 2 H. Bl. 235; *Pott v. Eyton*, 3 Com. B. 32.

<sup>3</sup> 8 H. of L. Cas. 268. See, also, 28 & 29 V., c. 86.

<sup>4</sup> *Mollwo, March & Co. v. The Ct. of Wards*, 4 Law Rep., P. C. 419, 435; *Ross v. Parkyns*, 20 Law Rep., Eq. 331, per Jessel, M. R.; 44 L. J., Ch. 610, S. C.; *Pooley v. Driver*, L. R., 5 Ch. D. 458, per Jessel, M. R.; 46 L. J., Ch. 466, S. C.; *Ex p. Tennant, re Howard*, per Ct. of App., L. R., 6 Ch. D. 303; *Ex p. Delhase, re Megevand*, L. R., 7 Ch. D. 511, per Ct. of App.; S. C. nom. *Re Megevand, Ex p. Delhase*, 47 L. J., Bk., 65; *Pawsey v. Armstrong*, 50 L. J., Ch. 683.

<sup>5</sup> *Stewart v. Forbes*, 1 Hall & T. 461, 472, per Ld. Cottenham, C., recognising the result of Ld. Eldon in *Peacock v. Peacock*, 16 Ves. 49, 56; *Webster v. Bray*, 7 Hare, 159; *M'Gregor v. Bainbrigge*, id. 164, n. a; *Robinson v. Anderson*, 20 Beav. 98; 7 De Gex, M. & G. 239, S. C.; *Collins v. Jackson*, 31 Beav. 645; *Story*, Part., § 24. But see, contra, *Peacock v. Peacock*, 2 Camp. 45, per Ld. Ellenborough; and *Tompson v. Williamson*, 7 Bligh, 432.

<sup>6</sup> *Gould v. Gould*, 6 Wend. 263.

<sup>7</sup> *Inst. lib. 3, tit. 26, § 1*; *Dig., lib. 17, tit. 2, § 29*.

Wensleydale has even held at *Nisi Prius*, that, in the absence of all evidence on the subject, partners must be presumed to be interested in equal proportions in the partnership *stock*.<sup>1</sup>

§ 185. Again, every member in an ordinary *trading* copartnership § 149 is presumed in law to be intrusted with a general authority to enter into contracts on behalf of the firm for the usual purposes of the business, and, consequently, to be empowered to borrow money, and to contract or pay debts, on account of the partnership, and to make, draw, indorse, and accept negotiable securities in the firm's name.<sup>2</sup> Similar powers, however, are not presumed to exist in the case of mining copartnership; and it is now determined that one of several co-adventurers in a mine has no authority, as such, to negotiate any bill on behalf of his fellows,<sup>3</sup> or to pledge the credit of the general body for money borrowed for the purposes of the concern.<sup>4</sup> Still less have the members of a firm, which is not established for trading purposes, as, for example, a firm of solicitors, any implied authority to bind each other by drawing or indorsing bills of exchange, or making promissory notes or even post-dated cheques.<sup>5</sup> Neither in an ordinary partnership has one member of the firm power to bind the others by contracts out of the apparent mode of the partnership dealings, merely because they are reasonable acts towards affecting the partnership purposes;<sup>6</sup> and, therefore, where a partner signed a guarantee in the name of the firm for the purpose of giving effect to a transaction within the scope of the partnership dealings, the court, in the absence of proof of any usage, and of any recognition by the other partners, refused to infer that he was authorised to act in this manner, and held that the firm was

<sup>1</sup> *Farrar v. Beswick*, 1 M. & Rob. 527.

<sup>2</sup> *Jenkins v. Morris*, 16 M. & W. 877, 880; *Ex parte Darlington, &c., Bank Co., re Riches & Marshall's Trust Deed*, 4 De Gex, J. & S. 581; *Story*, Part, §§ 102, 124, 125; *Bk. of Australasia v. Breillat*, 6 Moo. P. C. R. 152, 193, 194. See *MacLae v. Sutherland*, 3 E. & B. 1.

<sup>3</sup> *Dickinson v. Valpy*, 10 B. & C. 128; 5 M. & R. 126, S. C.

<sup>4</sup> *Ricketts v. Bennett*, 4 Com. B. 686; *Burmester v. Norris*, 6 Ex. R. 796. See, *In re German Mining Co.*, 22 L. J., Ch. 926; and post, § 1185, *ad fin.*

<sup>5</sup> *Foster v. Mackreth*, 2 Law R., Ex. 163; 36 L. J., Ex. 94, S. C.; *Hedley v. Bainbridge*, 3 Q. B. 316; 11 L. J., Q. B. 293, S. C.

<sup>6</sup> See *Bishop v. Countess of Jersey*, 2 Drew. 143.



not bound by the guarantee.<sup>1</sup> Had any evidence been given of the adoption of the act by the other partners, the result would, of course, have been different.<sup>2</sup>

§ 186. With respect to the law of *agency*, it may be noted, that § 149A when the seller deals with an agent resident in this country, and acting for a foreign principal, the ordinary presumption is that he does not contract with the foreigner, but that he simply trusts the party with whom he actually makes the bargain.<sup>3</sup> This rule, however, is by no means what Mr. Justice Story represents it to be,—“a presumption so strong, as almost to amount to a conclusive presumption of law;”<sup>4</sup> but it is at best a mere presumption of fact, liable to be rebutted by any evidence, whether extrinsic or intrinsic, which tends to show that credit was really intended to be given to the foreign principal.<sup>5</sup>

§ 187. One or two presumptions may here be mentioned, which § 150 attach to particular trades, and which, though apparently harsh, are in reality founded on just principles of public policy.<sup>6</sup> For instance, if goods intrusted<sup>7</sup> to a common *carrier* be lost or damaged, the law will conclusively presume that the carrier has been guilty of negligence, unless he can show that the loss or damage was occasioned by what is technically called “the act of God,” or by the Queen’s enemies.<sup>8</sup> So, the loss or damage of luggage, while under

<sup>1</sup> *Brettle v. Williams*, 4 Ex. R. 623; overruling *Ex parte Gardom*, 15 Ves. 286. See, also, *Hasleham v. Young*, 5 Q. B. 833; *Duncan v. Lowndes*, 3 Camp. 478. One partner has no implied authority to bind another by submission to arbitration, *Hatton v. Royle*, 27 L. J., Ex. 468.

<sup>2</sup> *Sandilands v. Marsh*, 2 B. & A. 673. See *MacLae v. Sutherland*, 3 E. & B. 1.

<sup>3</sup> *Heald v. Kenworthy*, 10 Ex. R. 743, per Parke, B.

<sup>4</sup> *Story, Agen.*, § 290.

<sup>5</sup> *Green v. Kopke*, 18 Com. B. 549; *Mahoney v. Kekulé*, 14 Com. B. 390.

<sup>6</sup> *Best, Ev.* 528—530.

<sup>7</sup> This rule does not extend to a passenger’s luggage placed in the same carriage with him on a railway; and if such luggage be lost or injured the Company will only be liable for the damage on *proof* of the negligence of their servants; *Bergheim v. Gt. East. Ry. Co.*, 47 L. J., C. P. 318, per Ct. of App.; L. R., 3 C. P. D. 221, S. C.

<sup>8</sup> *Ross v. Hill*, 2 Com. B. 890, per Tindal, C. J.; *Cogges v. Bernard*, 2 Ld. Ray. 918, per Ld. Holt; 1 Smith, L. C. 171, S. C. See post, § 1172. The Scotch law on this subject is now embodied in § 17 of 19 & 20 V., c. 60,

the custody of a stage-coachman, a cabman, or even a gratuitous bailee, will raise a *prima facie* inference of want of care, which, in the absence of evidence to the contrary, will render the bailee liable to an action.<sup>1</sup> So, when chattels, not exceeding in value the sum of thirty pounds,<sup>2</sup> have been deposited by a guest<sup>3</sup> in a public inn,—which term would seem to include an hotel, a tavern, and a coffee-house,<sup>4</sup>—and have there been lost or injured, the *prima facie* presumption is that the loss or injury was occasioned by the negligence, or, at least, through the defect, of the innkeeper or his servants:<sup>5</sup> but on proof that it was caused by the negligence of the

which enacts, that “all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire, while such goods are in the custody or possession of such carriers.”

<sup>1</sup> *Ross v. Hill*, 2 Com. B. 877; *Harris v. Costar*, 1 C. & P. 637; *Coggs v. Bernard*, 2 Ld. Ray. 909. See *Gt. North. Ry. Co. v. Sheppard*, 8 Ex. R. 30.

<sup>2</sup> The common law liability of innkeepers has been restricted by the Act of 26 & 27 V., c. 41, which enacts, in § 1, that no innkeeper shall be liable to make good to any guest any loss or injury to property brought to his inn “not being a horse or other live animal, or any gear appertaining thereto, or any carriage,” to a greater amount than thirty pounds, except 1, where such property “shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ;” 2, where such property “shall have been deposited expressly for safe custody with such innkeeper.” See *Moss v. Russell*, 30th Oct., 1884, per Ct. of App. The Act then contains a proviso that the innkeeper may require, as a condition of his liability, that the property shall be deposited in a box, or other receptacle, fastened and sealed by the depositor. §§ 2 & 3 respectively enact, that no innkeeper shall be entitled to the benefit of this Act, who refuses to receive for safe custody any property of his guests, or who omits to exhibit “in a conspicuous part of the hall or entrance to his inn” a printed copy of the first section of the Act. See, as to this last point, *Spice v. Bacon*, per Ct. of App., 46 L. J., Ex. 713; *L. R.*, 2 Ex. D. 463, S. C.

<sup>3</sup> The depositor must be a guest. See as to what constitutes a guest, *Strauss v. County Hotel Co.*, 53 L. J., Q. B. 25; *L. R.*, 12 Q. B. D. 27, S. C.

<sup>4</sup> *Thompson v. Lacy*, 3 B. & A. 283; *Turrill v. Crawley*, 13 Q. B. 197. § 4 of 26 & 27 V., c. 41, interprets the word “inn” as meaning “any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests.” See *Doe v. Laming*, 4 Camp. 76; and *R. v. Rymer*, *L. R.*, 2 Q. B. D. 136; 13 Cox, 378, S. C. A boarding-house or lodging-house keeper has no duty imposed upon him by law to take care of the lodgers’ goods, *Holder v. Soulby*, 29 L. J., C. P. 246; 8 Com. B., N. S. 254, S. C.; *Dansey v. Richardson*, 3 E. & B. 144.

<sup>5</sup> *Dawson v. Chamney*, 5 Q. B. 164; *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131, S. C.; *Richmond v. Smith*, 9 B. & C. 9; *Burgess v. Clements*, 4 M. & Sel. 306; *Armistead v. Wilde*, 17 Q. B. 261; *Calye’s case*, 8 Rep. 32 a; 1 Smith, L. C. 102, S. C.; *Day v. Bather*, 2 H. & C. 14.

guest, the landlord's responsibility will cease.<sup>1</sup> The salaried manager of an hotel belonging to a company, will not be regarded as an "inn-keeper" within the scope of this rule, though the hotel licence may have been granted to himself personally.<sup>2</sup>

§ 188. While discussing the subject of negligence, it deserves notice that the judges will occasionally permit, or even advise juries to infer negligence from the *mere happening of an accident*. For example, this course has been pursued where the injury complained of was caused, either by a collision between two railway trains belonging to the same company,<sup>3</sup> or by a railway carriage having, during the journey, unaccountably left the rails.<sup>4</sup> So, where a man was hurt by a barrel of flour falling on him out of a warehouse window while he was walking in the street below, the court held that it was unnecessary for him, in suing the warehouseman for negligence, to prove what actually occasioned the fall of the barrel.<sup>5</sup> The accident was one which, in the ordinary course of things, did not happen to those who used proper care in the management of their business, and therefore it afforded, in itself, reasonable evidence of negligence, in the absence of any explanation by the defendant.<sup>6</sup> On the other hand, in a case where it appeared that a ladder, inside a private house, had, from some unexplained cause, fallen against an upper window, and broken it, and the glass in falling had damaged the eye of a person who was passing by the house at the time, it was held that the proof of these facts alone was insufficient to fix negligence on the owner of the house.<sup>7</sup> § 150A

<sup>1</sup> *Armistead v. Wilde*, 17 Q. B. 261; *Cashill v. Wright*, 6 E. & B. 891; *Morgan v. Ravey*, 2 Fost. & Fin. 283; *Filipowski v. Merryweather*, id., 285; *Oppenheim v. White Lion Hotel Co.*, 40 L. J., C. P. 231; 6 Law Rep., C. P. 515, S. C.; *Spice v. Bacon*, per Ct. of App., 46 L. J., Ex. 713; L. R., 2 Ex. D. 463, S. C.

<sup>2</sup> *Dixon v. Birch*, 42 L. J., Ex. 135.

<sup>3</sup> *Skinner v. Lond. & Brigh. Ry. Co.*, 5 Ex. R. 787.

<sup>4</sup> *Flannery v. Waterf. & L. Ry. Co.*, 11 C. L. 30.

<sup>5</sup> *Byrne v. Boadle*, 2 H. & C. 722; 33 L. J., Ex. 13 S. C.; *Scott v. Lond. Dock C.*, 34 L. J., Ex. 220; 3 H. & C. 596, S. C.; *Kearney v. Lond. & Brigh. Ry. Co.*, 5 Law Rep., Q. B. 411; 39 L. J., Q. B. 200, S. C.; 6 Law Rep., Q. B. 759, & 40 L. J., Q. B. 285, S. C. in Ex. Ch. <sup>6</sup> Id.

<sup>7</sup> *Higgs v. Maynard*, 1 H. & R. 581; *Welfare v. Lond. & Brigh. Ry. Co.*, 38 L. J., Q. B. 241; 4 Law Rep., Q. B. 693, S. C. See *Moffatt v. Bateman*, 3 Law Rep., P. C., 115.

§ 189. Other disputable presumptions arise in respect of *infants*. § 151  
Thus, during the interval between seven years and fourteen, infants are *prima facie* presumed to be unacquainted with guilt, and therefore cannot be convicted, unless the jury shall be satisfied from the evidence, that, at the time when the offence was committed, they had a guilty knowledge that they were doing wrong.<sup>1</sup> This rule, though perhaps originally adopted in *favorem vitæ* with respect to capital offences only,<sup>2</sup> has for many years past been expressly held applicable to all felonies;<sup>3</sup> and there seems no reason why, on principle, it should not also be extended to misdemeanors, with the exception, perhaps, of those cases where an infant occupier of lands, charged with the repair of a bridge or road, might be held liable to an indictment for non-repair.<sup>4</sup> The test of juvenile exemption propounded by Lord Hale, is whether the accused was capable of discerning "between good and evil;"<sup>5</sup> words sufficiently indefinite, since they may apply either to legal responsibility or to moral guilt:<sup>6</sup> and many children of tender years, though perfectly well aware that it is wrong to take what does not belong them, and who are consequently, according to this test, fit subjects for punishment, may yet be only partially acquainted with the sinful nature of theft, and be wholly ignorant that it is a crime against the law of the land. It seems, therefore, to be a law savouring of harshness which permits a child, under such circumstances, to suffer the same punishment as it inflicts upon a grown person. Indeed, the loose and unsatisfactory manner in which this merciful presumption of infantine innocence has—at least in former years—been practically rebutted, cannot be more clearly exposed than by referring to a statistical return of juvenile delinquents, published in the present reign, by which it appears that, out of 297 children under the age of fifteen, committed in the metropolis alone during a single year, 238 were actually convicted; and of these no fewer than 36 were sentenced to transporta-

<sup>1</sup> Russ. C. & M. 1--5<sup>2</sup> 1 Hale, c. 3.<sup>3</sup> R. v. Owen, 4 C. & P. 236.<sup>4</sup> R. v. Sutton, 3 A. & E. 597, 612.<sup>5</sup> 1 Hale, 27.<sup>6</sup> See 30 Law Mag. 24, and article on M'Naughten's trial in Leg. Obs. for May 27, 1843, as to the dangerous and unphilosophical nature of this test.

tion.<sup>1</sup> If in all these cases *malitia supplevit ætatem*, no one will dispute but that malice has had much to supply.

§ 190. With respect to *married women*, also, the law recognises § 152 certain presumptions. Thus, if a wife commit a felony,<sup>2</sup> other than treason or homicide,<sup>3</sup> or, perhaps, highway robbery,<sup>4</sup> in company with her husband, the law presumes that she acted under his coercion, and consequently without any guilty intent, unless the fact of non-coercion be distinctly proved. This presumption appears, on some occasions, to have been considered conclusive, and is still *practically* regarded in no very different light, especially when the crime is of a flagrant character:<sup>5</sup> but the better opinion seems to be, that in every case, the presumption *may now* be rebutted by *positive* proof that the woman acted as a free agent;<sup>6</sup> and in one case that was much discussed,<sup>7</sup> the Irish judges appear to have considered that such positive proof was not required, but that the

<sup>1</sup> Porter's Statist. Tables, part 14, pp. 149, 151, 152, 153. In 1844, 1596 children, under the age of fifteen, were committed for trial in England and Wales. Porter's Progress of Nation, p. 656.

<sup>2</sup> Some doubt exists as to the crimes exempted from this presumption. "Thus Ld. Hale, in one part of his Pleas of the Crown, vol. i. pp. 45, 47, asserts that the presumption is recognised in all cases excepting treason and murder; but in later passages, id. 434, 516, he excludes from its operation manslaughter also, and cites as his authority a passage from Dalton, in which manslaughter is not mentioned, Dalt. c. 104, p. 267; new ed. c. 157, p. 503. Mr. Serjt. Hawkins makes the exceptions consist of treason, murder, and robbery, 1 Hawk. c. 1, p. 4; while Mr. Justice Blackstone, in the first vol. of his Comm. mentions only treason and murder, c. 15; and in the 4th vol., c. 2, excepts also crimes that are mala in se, and prohibited by the law of nature, as murder and the like. \* \* We would gladly see the exception extended to all capital felonies, if not to all crimes punishable with transportation, and thus abolish a rule of law, which was originally founded on doctrines that no longer prevail, and which every married man knows is often diametrically opposed to the fact."—30 Law Mag. pp. 9, 11.

<sup>3</sup> See *R. v. Manning*, 2 C. & Kir. 887, 903.

<sup>4</sup> In *R. v. Stapleton, Jebb*, C. C. 93, the majority of the judges appeared to think that this presumption did not apply to cases of highway robbery. Neither does it apply to a case of felonious wounding with intent to disfigure, or to do grievous bodily harm, *R. v. Smith, Dear. & Bell*, 553; 8 Cox, 27 S. C. But see *R. v. Torpey*, 12 Cox, 45.

<sup>5</sup> 1 Hale, 45; *R. v. Archer*, 1 Moo. C. C. 143. See *R. v. Torpey*, 12 Cox, 45.

<sup>6</sup> See 7 Rep. of Cri. Law Com. p. 21; 30 Law Mag. pp. 9—12; *R. v. Hughes*, 2 Lew. C. C. 229; 1 Russ. C. & M. 22, S. C.; *R. v. Pollard*, 8 C. & P. 553, per Tindal, C. J., and Vaughan, J., in a case of arson where the husband was bedridden. See also *R. v. Smith, Jr. Cir.* R. 459.

<sup>7</sup> *R. v. Stapleton, Jebb*, C. C. 93.

question was always one to be determined by the jury on the evidence submitted to them. It seems that a married woman cannot be convicted under any circumstances as a receiver of stolen goods, when the property has been taken by her husband, and given to her by him; <sup>1</sup> nor—prior to the 1st of January, 1883,<sup>2</sup>—could she have been convicted of stealing her husband's goods, though she might have committed adultery and have absconded with her paramour, taking the goods with her.<sup>3</sup> This last rule, however, has now been happily abrogated by the "Married Women's Property Act, 1882."<sup>4</sup>

§ 191. Whether the doctrine of coercion extends to any misde- § 153  
meanors may admit of some doubt, but the better opinion seems to be, that, provided the misdemeanor be of a serious nature, as, for instance, the uttering of base coin,<sup>5</sup> the wife will be protected in like manner as in cases of felony, although it has been distinctly held that the protection does not extend to assaults and batteries,<sup>6</sup> or to the offence of keeping a brothel.<sup>7</sup> Indeed, it is probable that in all inferior misdemeanors, this presumption,—if admitted at all,—would be held liable to be defeated by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony.<sup>8</sup>

§ 192. If an action be brought against a husband for goods § 153  
supplied to his family or his wife, on the order of the latter, the jury will do well to infer, in the absence of evidence to the contrary, that the wife gave the order as the husband's agent, provided she were living with him at the time, and the articles were neither

<sup>1</sup> *R. v. Brooks*, Pearce & D. 184. See *R. v. Wardroper*, Bell, C. C. 249; 8 Cox, 284, S. C.

<sup>2</sup> When the Married Women's Property Act, 1882, came into operation, 45 & 46 V., c. 75, § 25.

<sup>3</sup> *R. v. Kenny*, 46 L. J., M. C. 156; 13 Cox, 397; and L. R., 2 Q. B. D. 307, S. C.

<sup>4</sup> 45 & 46 V., c. 75, §§ 12, 16; *R. v. Brittleton*, per Ct. of Crim. App., L. R., 12 Q. B. D. 286. 53 L. J., M. C. 83, S. C.; and 15 Cox, 431.

<sup>5</sup> *R. v. Conolly*, 2 Lew. C. C. 229, per Bayley, J.; *R. v. Price*, 8 C. & P. 19; Anon., Ir. Cir. R. 374.

<sup>6</sup> *R. v. Cruse*, 8 C. & P. 541; 2 Moo. C. C. 53, S. C.; *R. v. Ingram*, 1 Salk. 384.

<sup>7</sup> *R. v. Williams*, 10 Mod. 63; 4 Bl. Com. 29.

<sup>8</sup> *R. v. Cruse*, 8 C. & P. 541; 2 Moo. C. C. 53, S. C.

excessive in quantity, improvident in quality, nor extravagant in price.<sup>1</sup> But this presumption may always be rebutted by proof that the husband, while supplying his wife with an adequate allowance, has expressly forbidden her to pledge his credit even for necessities; and that, too, though the tradesman may have had no knowledge whatever of the husband's prohibition.<sup>2</sup> If the debt has been incurred by the wife while living separate from her husband, the doctrine of presumptive agency will depend on the cause of separation. If the wife has been turned out of doors or deserted by the husband, or if she has left him because his misconduct was such as to render it impossible for her to remain under his roof,<sup>3</sup> she has by law an implied authority to pledge his credit for necessities,<sup>4</sup> whether supplied to herself or to her infant child,<sup>5</sup> unless by an adequate<sup>6</sup> allowance from her husband, or by the terms of her settlement, or perhaps by her own exertions, she be in a position to provide for her maintenance.<sup>7</sup> On the other hand, a wife who leaves her husband without his consent, and without justifiable cause, has no authority whatever to bind him by her contracts;<sup>8</sup> and where the husband and wife have parted by mutual consent, and

<sup>1</sup> *Lane v. Ironmonger*, 13 M. & W. 368, recognising *Freestone v. Butcher*, 9 C. & P. 637, per *Ld. Abinger*; *Atkins v. Curwood*, 7 C. & P. 757; *Johnston v. Sumner*, 3 H. & N. 261; *Morgan v. Chetwynd*, 4 Fost. & Fin. 451, per *Cockburn, C. J.*; *Waitman v. Wakefield*, 1 Camp. 120; *Manby v. Scott*, 2 Smith, L. C. 419—422, in n. See *Reneaux v. Teakle*, 8 Ex. R. 680; *Philipson v. Hayter*, 40 L. J., C. P. 14; 6 Law Rep., C. P. 38, S. C. nom. *Philipson v. Hayter*; *Moylan v. Nolan*, 17 Ir. Law R., N. S. 427; *Reid v. Teacle*, 13 Com. B. 627; *Ruddock v. Marsh*, 1 H. & N. 601; *Jewsbury v. Newbold*, 26 L. J., Ex. 247; and post, §§ 770, 771, 842.

<sup>2</sup> *Debenham v. Mellon*, 50 L. J., Q. B. 155 per *Dom. Proc.*; L. R., 6 App. Cas. 24, S. C.; L. R., 5 Q. B. D. 394, per *Ct. of App.*; 49 L. J., Q. B. 497, S. C.; *Jolly v. Rees*, 33 L. J., C. P. 177; 15 Com. B., N. S. 628, S. C.; *Ryan v. Nolan*, 1 R., 3 C. L. 319; *Jetley v. Hill*, 1 Cab. & El. 239 per *Pollock, B.*

<sup>3</sup> *Bazeley v. Forder*, 3 Law Rep., Q. B. 562, per *Blackburn, J.*; 9 B. & S. 602, S. C., and 37 L. J., Q. B. 240, S. C. nom. *Bazeley v. Forder*.

<sup>4</sup> *Wilson v. Ford*, 3 Law Rep., Ex. 63; 37 L. J., Ex. 60, S. C. As to how far this doctrine applies to cases where the wife has retained a solicitor to act for her in divorce or other legal proceedings against her husband, see *Ottaway v. Hamilton* 47 L. J. Q. B., 725, per *Ct. of App.*; *Mecredy v. Taylor*, 1 R., 7 C. L. 256 *Shepherd v. Mackoul*, 3 Camp. 326; *Brown v. Ackroyd*, 5 E. & B. 819; *Grindell v. Godmond*, 5 A. & E. 755.

<sup>5</sup> *Bazeley v. Forder*, 3 Law Rep., Q. B. 559; 9 B. & S. 599, S. C.; and 37 L. J., Q. B., 237, S. C. nom. *Bazeley v. Forder*.

<sup>6</sup> *Baker v. Sampson*, 14 Com. B., N. S. 383.

<sup>7</sup> *Johnston v. Sumner*, 3 H. & N. 261.

<sup>8</sup> *Id.*

the wife has afterwards incurred a debt for articles suitable to her degree, the creditor, before he can recover from the husband, must affirmately show either an express authority from him, or at least such circumstances as will justify the jury in implying an authority; for instance, that the wife has been left without adequate means of support, or that an allowance promised to her by the husband had not been paid.<sup>1</sup> It may here be noticed that the authority of a wife to pledge her husband's credit is no greater when he is a lunatic than when he is sane.<sup>2</sup>

§ 193. Though a wife may often have an implied authority from her husband to procure goods on credit, an English court of law would never, under the old system, presume that she was his agent for the purpose of *borrowing money*; and even though she were turned out of doors without any misconduct on her part, and without any means of livelihood, her husband could not be held liable at law for *money lent* to her, notwithstanding she might have expended the whole of it in procuring the actual necessities of life.<sup>3</sup> As this doctrine savoured rather of the common law than of common sense, it found no countenance in courts of equity; and a creditor who had been nonsuited on the above ground by a learned justice or baron, might still have obtained his rights,—though tardily,—at the hands of a vice-chancellor.<sup>4</sup> A more reputable state of the law at present prevails, and the judges,—rejecting the distinction between accrediting a wife to supply herself with necessities, and accrediting a “neighbour” to supply a wife with money for the same purpose,—must henceforth adopt the rules of equity as their guide in this matter.<sup>5</sup>

<sup>1</sup> *Johnston v. Sumner*, 3 H. & N. 261; *Biffin v. Bignell*, 7 H. & N. 877; *Eastland v. Burchell*, L. R., 3 Q. B. D. 432; 47 L. J., Q. B. 500, S. C. See *Manby v. Scott*, 2 Smith, L. C. 422—430.

<sup>2</sup> *Richardson v. Du Bois*, 5 Law Rep., Q. B. 51; 39 L. J., Q. B. 69; and 10 B. & S. 830, S. C. See *Drew v. Nunn*, L. R., 4 Q. B. D. 661, per Ct. of App.

<sup>3</sup> *Knox v. Bushell*, 3 Com. B., N. S. 334.

<sup>4</sup> *Jenner v. Morris*, 30 L. J., Ch. 361; 2 De Gex, F. & J. 45, S. C. See *Davidson v. Wood*, 2 New R. 15, per Wood, V.-C.; S. C. cor. Lds. Ja., 1 De Gex, J. & S. 465, nom. In re Wood's estate.

<sup>5</sup> This was the old law in Ireland, *Johnson v. Manning*, 12 Ir. Law R., N. S. 148.



§ 194. In suits for nullity of marriage on the ground of incurable § 153B  
 impotence, the Matrimonial Court has of old time adopted for its guidance a somewhat fantastic rule; for where the marriage has not been consummated, and no visible defect is proved to exist in either party,<sup>1</sup> impotence is presumed after, but not before, the expiration of three years of ineffectual cohabitation.<sup>2</sup> This rule, however, only applies where the impotence is left to be presumed from continual non-consummation; for the court will never call in its aid, and still less rely on its twilight guidance, when other evidence on the subject can be obtained.<sup>3</sup>

§ 195. The presumptions with respect to *parent* and *child* are § 154  
 not very important. The law so far recognises the superiority of age over youth, that if a parent and a child both bear the same Christian and surname, and this name occur in an instrument without any addition of "senior" or "junior," it will be presumed, in the absence of evidence to the contrary, that the parent was intended.<sup>4</sup> Thus, if a legacy be left, or a note be made payable, to John Holland, and there be two of that name, father and son, the law will, *prima facie*, presume that the father is respectively the legatee or payee; but this presumption may readily be rebutted, as for instance, in the case of the will, by proving that the testator did not know the father,<sup>5</sup> or in the case of the note, by showing that the son had had it in his possession, or had indorsed it, or had given instructions to bring an action upon it.<sup>6</sup> The mere moral obligation of a parent to maintain his child affords no legal inference of a promise to pay a debt contracted by him even for necessities.<sup>7</sup>

<sup>1</sup> See *D.*, falsely called *F. & F.*, 34 L. J., Pr. & Mat. 66; *B.*, falsely called *B. v. B.*, 1 R. 9 Eq. 551.

<sup>2</sup> *M.*, falsely called *H. v. H.*, 33 L. J., Pr. & Mat. 159; 3 Swab. & Trist. 517, S. C.; *Lewis*, falsely called *Hayward v. Hayward*, 35 L. J., Pr. & Mat. 105, in Dom. Proc.

<sup>3</sup> *F.*, falsely called *D. v. D.*, 4 Swab. & Trist. 86.

<sup>4</sup> *Stebbing v. Spicer*, 8 Com. B. 827; *Lepiot v. Browne*, 1 Salk. 7; *Sweeting v. Fowler*, 1 Stark. R. 106; *Jarman v. Hooper*, 6 M. & Gr. 827.

<sup>5</sup> *Lepiot v. Browne*, 1 Salk. 7.

<sup>6</sup> *Stebbing v. Spicer*, 8 Com. B. 827; *Sweeting v. Fowler*, 1 Stark. R. 106.

<sup>7</sup> *Shelton v. Springett*, 11 Com. B. 452; recognising *Mortimore v. Wright*, (3079)

§ 196.<sup>1</sup> Other presumptions are founded on the experienced § 148  
*continuance*, or *immutability*, for a longer or shorter period, of  
 human affairs.<sup>2</sup> When, therefore, the existence of a person, or  
 personal relation, or a state of things, is once established by  
 proof, the law presumes that the person, relation, or state of  
 things continues to exist as before, till the contrary is shown, or  
 till a different presumption is raised, from the nature of the sub-  
 ject in question.<sup>3</sup> Thus, where a jury found that a certain custom  
 existed up to the year 1689, the court held, that, in the absence  
 of all evidence of its abolition, this was in legal effect a verdict  
 finding that the custom still subsisted at the time of the trial  
 in 1840.<sup>4</sup> So, in settlement cases, the court will presume that  
 a son, though long since arrived at manhood, has continued  
 unemancipated, as in the days of his infancy, unless there be some  
 evidence to rebut this presumption, as, for instance, if proof be  
 given that he has separated from his family.<sup>5</sup> So, in the absence  
 of evidence to the contrary, the settlement of a pauper,<sup>6</sup> or the  
 appointment of a party to an official situation, will,<sup>7</sup> at least for  
 a reasonable time, be presumed to remain in force. So, a partner-  
 ship, agency, tenancy,<sup>8</sup> or other similar relation, once shown to  
 exist, is presumed to continue, till it is proved to have been dis-  
 solved; and, therefore, where a partnership was admitted to have  
 been in existence in 1816, it was, in the absence of all evidence to  
 the contrary, presumed to be still continuing in 1838.<sup>9</sup> So, when

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6 M. & W. 482, and overruling *Baker v. Keene*, 2 Stark. R. 501; *Blackburn v. Mackey*, 1 C. & P. 1; *Law v. Wilkin*, 6 A. & E. 718; 1 N. & P. 697, S. C. See *Bazeley v. Forder*, 3 Law Rep., Q. B. 559; 9 B. & S. 599, S. C., 37 L. J., Q. B. 237, S. C. nom. *Bazeley v. Forder*.

<sup>1</sup> Gr. Ev. § 41, as to first seven lines.

<sup>2</sup> 6 Com. B. 630.

<sup>3</sup> See *Price v. Price*, 16 M. & W. 232, 240—242, overruling *Mercer v. Cheese*, 4 M. & Gr. 804. See, also, *The Gananogue*, Lush. Adm. R. 448.

<sup>4</sup> *Scales v. Key*, 11 A. & E. 819.

<sup>5</sup> *R. v. Lilleshall*, 7 Q. B. 158, explaining *R. v. Oulton*, 5 B. & Ad. 958; 3 N. & M. 62, S. C.

<sup>6</sup> *R. v. Tanner*, 1 Esp. 306, per Ashhurst, J.

<sup>7</sup> *R. v. Budd*, 5 Esp. 230, per Ld. Ellenborough.

<sup>8</sup> See *Pickett v. Packham*, 4 Law Rep. Ch. Ap. 190.

<sup>9</sup> *Clark v. Alexander*, 8 Scott, N. R. 161. See, also, *Alderson v. Clay*, 1 Stark. R. 405; *Blandy v. De Burgh*, 6 Com. B. 623, 630; and *Parsons v. Hayward*, 31 L. J., Ch. 666. So, by the Hindoo law, a family once joint is presumed to retain that status, unless evidence can be given to show that it has become divided, *Mussumat Cheetha v. Baboo Miheen Lall*, 11 Moo. Ind. App. C. 369, 380.

a business is carried on by partners after the expiration of the term limited by the articles, the law *prima facie* presumes, that such of the provisions of those articles, as are not inconsistent with a partnership at will, still continue to apply; however difficult it may be, in some cases, to determine what provisions fall within this category.<sup>1</sup> So, if a man were on several occasions to authorise his mistress to order goods from a tradesman on his credit, the jury would be amply justified in finding him liable for articles supplied after the termination of the connexion, in the absence of any proof that the tradesman had received notice of such termination.<sup>2</sup>

§ 197. So, if a debt be shown to have once existed, its continuance § 155 will be presumed, in the absence of proof of payment, or some other discharge.<sup>3</sup> So, where a tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation; and this presumption still prevails, though the rent has been advanced,<sup>4</sup> and though the original lessor has assigned his interest to a third party, or, being a clergyman, has resigned his living, and a fresh incumbent has succeeded him.<sup>5</sup> The opinions,<sup>7</sup> also, of individuals, once entertained and expressed, and their state of mind, once proved to exist, are,—in startling opposition to the practical experience of mankind, at least in this the nineteenth century,—presumed to remain unchanged, till the contrary appears. Thus, all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the

<sup>1</sup> *Cox v. Willoughby*; L. R., 13 Ch. D. 863, per Fry, J.; 49 L. J., Ch. 237, S. C.; *Clark v. Leach*, 32 L. J., Ch. 290; 32 Beav. 14, S. C.; 1 De Gex, J. & S. 409, S. C. See *Woods v. Lamb*, 35 L. J., Ch. 309, per Wood, V. C.

<sup>2</sup> *Ryan v. Sams*, 12 Q. B. 460.

<sup>3</sup> *Jackson v. Irvin*, 2 Camp. 50, per Ld. Ellenborough.

<sup>4</sup> *Torriano v. Young*, 6 C. & P. 8; *Thomas v. Packer*, 1 H. & N. 669; 23 & 24 V., c. 154, § 5, Ir. But see *Oakley v. Monck*, 34 L. J., Ex. 137; 3 H. & C. 706, S. C.; 35 L. J., Ex. 87, S. C. in Ex. Ch.; 1 Law R., Ex. 159; and 4 H. & C. 251, S. C.

<sup>5</sup> *Digby v. Atkinson*, 4 Camp. 275, per Ld. Ellenborough; explained in *Johnson v. St. Peter*, Hereford, 4 A. & E. 525, 526.

<sup>6</sup> *Hutton v. Warren*, 1 M. & W. 466. See *Thetford v. Tyler*, 8 & B. 95, 100, 101.

<sup>7</sup> Gr. Ev. § 42.

existence and moral government of God till it is shown from his own declarations.<sup>1</sup> In like manner, every man is presumed to be of sane mind, till the contrary is shown;<sup>2</sup> but if any derangement or imbecility is proved or admitted at any particular period, it is presumed to continue, till disproved,<sup>3</sup> unless it be obviously of a partial or temporary character.<sup>4</sup>

§ 198. So, where a person is once shown to have been living, § 156 the law, in the absence of proof that he has not been heard of within the last seven years, will in general presume that he is still alive:<sup>5</sup> unless after a lapse of time considerably exceeding the ordinary duration of human life. In the civil law the legal presumption of life ceases at the expiration of one hundred years from the date of the birth,<sup>6</sup> and the same rule appears to have been adopted in Scotland,<sup>7</sup> but in England, no definite period has been conclusively fixed, during which the presumption is allowed to

<sup>1</sup> *The State v. Stinson*, 7 Law Reporter, 383.

<sup>2</sup> *Dyce, Sombre v. Troup, Deane*, Ec. R. 38, per Sir J. Dodson. In *Sutton v. Sadler*, 26 L. J., C. P. 284; 3 Com. B., N. S. 87, S. C., the court held that this presumption was one of *fact*, which ought not to influence the jury in a case of conflicting evidence. See, also, *Anderson v. Gill*, 3 Macq., Sc. Cas. H. of L. 197, per Ld. Wensleydale; *Crowninshield v. Crowninshield*, 2 Gray, 524.

<sup>3</sup> *Att.-Gen. v. Parnter*, 3 Br. C. C. 443; *Grimani v. Draper*, 6 Ec. & Mar. Cas. 421, 422, 441, per Sir H. Fust; *Johnson v. Blane*, id. 457, 461, per id.; *Dyce Sombre v. Troup, Deane*, Ec. R. 49, 50, per Sir J. Dodson; *Prinsep & East India Co. v. Dyce Sombre*, 10 Moo. P. C. R. 232, 244—247; *Nicholas & Freeman v. Binns*, 1 Swab. & Trist. 243, per Sir J. Cresswell; *Hassard v. Smith*, 1 R. 6 Eq. 429; *Blake v. Johnson*, Milw. Ec. Ir. R. 164—166; *Smith v. Tebbitt*, 1 Law Rep., P. & D. 398, 434.

<sup>4</sup> *Walcot v. Alleyn*, Milw. Ec. Ir. R. 69; *Legeyt v. O'Brien*, id. 334—337; *Airey v. Hill*, 2 Add. 209; *White v. Wilson*, 13 Ves. 87; *Hall v. Warren*, 9 Ves. 605, 611,

<sup>5</sup> See, however, *R. v. Lumley*, 1 Law Rep., C. C. 196; 38 L. J. M. C. 86; 11 Cox, 274, S. C., cited ante, § 114.

<sup>6</sup> *Vivere etiam usque ad centum annos quilibet præsimitur, nisi probetur mortuus*. *Corpus Juris Glossatum*, tom. 2, p. 718, n. q; 1 Masc. de Prob. concl. 103, n. 5; *Campegius Tract. de Test. reg.* 350.

<sup>7</sup> *Morison*, Presump. xvi., *Carstairs v. Stewart*, 1731; *Hubb.*, Ev. of Suc. 168. Mr. Dickson in his most valuable work on the Law of Evid. in Scotland, states that, "a precise limit to this presumption has not been fixed." 1 vol., p. 183. For other foreign laws on the same subject, see *Hubb.*, Ev. of Suc. 758, 759.

prevail. In several old cases, where feoffments for terms varying from ninety-nine to eighty years had been made to particular tenants, the possibility of their surviving the expiration of the terms was neglected in determining the nature of the remainders;<sup>1</sup> and the book of a tithe-collector, written seventy-four years before, has been admitted in evidence, without proof that any inquiries had been made for the writer.<sup>2</sup> Nay, in one case a receiver's account was allowed to be read after the lapse of fifty-four years only, though no proof was tendered respecting the writer's death.<sup>3</sup>

§ 199. On the other hand, where a term was for sixty years, the court took into consideration the possibility of the termor living after its expiration;<sup>4</sup> and the deposition of a witness taken sixty years before the trial has been rejected, no search having been made for the deponent, and no account being given of him.<sup>5</sup> In an action of ejectment, where the lessor of the plaintiff, to prove his title, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were allowed to presume, not only that these persons were dead, but, in the absence of all evidence to the contrary, that they had died unmarried and without issue.<sup>6</sup> This case would probably be considered

<sup>1</sup> *Weale v. Lower*, Poller. 67, per *Ld. Hale*; *Napper v. Sanders*, Hutt. 119; *Ld. Derby's case*, Lit. R. 370.

<sup>2</sup> *Jones v. Waller*, 1 Price, 229. See, also, *Doe v. Davies*, 10 Q. B. 314, 324, 325.

<sup>3</sup> *Doe v. Michael*, 17 Q. B. 276.

<sup>4</sup> *Beverley v. Beverley*, 2 Vern. 131; *Doe v. Andrews*, 15 Q. B. 756.

<sup>5</sup> *Benson v. Olive*, 2 Str. 920; *Manby v. Curtis*, 1 Price, 225.

<sup>6</sup> *Doe v. Deakin*, 3 C. & P. 402; 8 B. & C. 22, S. C., nom. *Doe v. Wolley*. There Bayley, J., in stating that the jury had properly made this presumption, relied on the general rule, that things must be presumed to remain in the same state in which they were proved to have once been, unless there is some evidence of a subsequent alteration, 3 C. & P. 403; but it is submitted that the rule was in this case strained somewhat beyond its legitimate extent; for if presumptions are founded, as they should be, on the experienced course of events, it was surely more probable that one out of four brothers should marry and have children, than that they should all die unmarried. In *Doe v. Griffin*, 15 East, 293, where a similar question arose, evidence negating the marriage of the party, who was presumed to have died without issue, was given; and in *Richards v. Richards*, id. 294, n. a, where the lessor of the plaintiff claimed as heir by descent, and proved the death of his elder brothers, the court held that he must further show that they died without issue, since in ejectment no presumption could be admitted against the

at the present day as carrying the law of presumptions somewhat beyond its legitimate bounds, but this much is clear, that, whenever it becomes necessary to prove the exhaustion of remote branches of a family, the jury may safely be advised to act on very slight evidence, such, for example, as unanswered advertisements or ineffectual inquiries.<sup>1</sup>

§ 200. Although the presumption of life will continue for a <sup>157</sup> period exceeding half a century, if no proof be given either that the party, whose death is relied upon, has not been heard of by those persons who would naturally have heard of him had he been alive, or, at least, that search has been ineffectually made to find him,<sup>2</sup>—this presumption will be bounded within far shorter limits, if evidence be furnished of his continuous unexplained absence from home, and of the non-receipt of intelligence concerning him. In such case,<sup>3</sup> after the lapse of *seven years*, the presumption of life ceases, and the burthen of proof is devolved on the party denying the death.<sup>4</sup> This period was inserted in the old statute of Charles II. concerning leases for lives,<sup>5</sup> and it has since been adopted, by analogy, in other cases.<sup>6</sup> It is also recognised in the various

person in possession. See, *In re Webb's estate*, Ir. R., 5 Eq. 235; *Mullaly v. Walsh*, I. R. 6 C. L. 314.

<sup>1</sup> *Greaves v. Greenwood*, 46 L. J., Ex. 252, per Ct. of App.; L. R., 2 Ex. D. 289, S. C.

<sup>2</sup> *Doe v. Andrews*, 15 Q. B. 756.

<sup>3</sup> Gr. Ev. § 41, in part.

<sup>4</sup> *Hopewell v. De Pinna*, 2 Camp. 113; *Rust v. Baker*, 8 Sim. 443; *Loring v. Steineman*, 1 Metc. 204. See *Bowden v. Henderson*, 2 Sm. & Giff. 360, where it was held, that the presumption of death after seven years' absence does not arise, if the probability of the exile sending intelligence home be rebutted by circumstances. See also *M'Mahon v. M'Elroy*, I. R., 5 Eq. 1; *Prudential Ass. Co. v. Edmonds*, L. R., 2 App. Cas. 487, per Dom. Proc.

<sup>5</sup> 19 C. 2, c. 6, § 2. See also 6 A., c. 18, which is entitled, "An Act for the more effectual discovery of the death of persons pretended to be alive, to the prejudice of those who claim estates after their deaths."

<sup>6</sup> *Doe v. Jesson*, 6 East, 85; *Doe v. Deakin*, 4 B. & A. 433; *King v. Paddock*, 18 Johns. 141. In Scotland the law on this subject will be found embodied in "The Presumption of Life Limitation (Scotland) Act, 1881," 44 & 45 V., c. 47. See especially § 8. In America it is not necessary that the party be proved to be absent from the United States; it is sufficient if it appears that he has been absent for seven years from the particular State of his residence, without having been heard of, *Newman v. Jenkins*, 10 Pick. 515; *Innis v. Campbell*, 1 Rawle, 373; *Spurr v. Trimble*, 1 A. K. Marsh. 271; *Wambough v. Shenk*, 1 Penningt. 167; *Woods v. Woods*, 2 Bay, 476. In the N. York (3084)

Acts relating to bigamy ;<sup>1</sup> and if, on an indictment for that crime, it appear that the prisoner and his first wife had lived apart for seven years before he married again, mere proof that the first wife was alive at the time of the second marriage will not warrant a conviction, but some affirmative evidence must be given to show that the accused was aware of this fact.<sup>2</sup> But although a person, who has not been heard of for seven years, is presumed *to be dead*, the law raises no presumption as to the *time* of his death ; and therefore, if any one has to establish the precise period during those seven years, at which such person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor on the other, upon the presumption of the continuance of life.<sup>3</sup>

Civ. Code, the presumption is thus briefly expressed :—"That a person not heard from in seven years is dead ;" § 1780, art. 26. As to cases where the presumption of life conflicts with that of innocence, see § 114, ante.

<sup>1</sup> 1 J. 1, c. 11, § 2 ; 9 G. 4, c. 31, § 22 ; 24 & 25 V., c. 100, § 57.

<sup>2</sup> *R. v. Curgenwen*, 35 L. J., M. C. 58 ; 10 Cox, 152, S. C. ; 1 Law Rep., C. C. 1, S. C. See *R. v. Jones*, 52 L. J., M. C. 96 ; 15 Cox, 284, S. C.

<sup>3</sup> *Phene's Trusts*, re, 5 Law Rep., Ch. Ap. 139 ; 39 L. J., Ch. 316, S. C. ; *Lewes's Trusts*, re, 11 Law Rep., Eq. 236 ; 6 Law Rep., Ch. Ap. 356, and 40 L. J., Ch. 602, S. C. ; *Corbishley's Trusts*, re, 49 L. J., Ch. 266 ; L. R., 14 Ch. D. 846, S. C. ; *Hickman v. Upsall*, 20 Law Rep., Eq. 138 ; 46 L. J., Ch. 245, S. C. on App. ; *Lambe v. Orton*, 29 L. J., Ch. 286 ; *Pennefather v. Pennefather*, I. R. 6 Eq. 171 ; *Thomas v. Thomas*, 2 Drew. & Sm. 298 ; In re *Benham's Trusts*, 37 L. J., Ch. 265, per Rolt, L. J., reversing decision by *Malins, V.-C.*, as reported in 36 L. J., Ch. 502 ; 4 Law Rep. Eq. 416, S. C. ; In re *Peck*, 29 L. J., Pr. & Mat. 95 ; In re *Nichols*, 41 L. J., Pr. & Mat. 88 ; *Dunn v. Snowden*, 32 L. J., Ch. 104 ; 2 Drew. & Sm. 201, S. C. ; *Doe v. Nepean*, 5 B. & Ad. 86 ; 2 N. & M. 219, S. C. ; *Nepean v. Doe d. Knight*, 2 M. & W. 894, in Ex. Ch. ; 2 Smith, L. C. 476, 492, 577, S. C. In that case *Ld. Denman*, in pronouncing the judgment of the court, observes—"It is true the doctrine will often practically limit the time for bringing the action of ejectment in such cases [viz., where the plaintiff claims as grantee in reversion of an estate] ; and circumstances may be supposed, as of a lease for seven years, commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiries respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances."—2 M. & W. 913, 914.

§ 201. Where it appeared that a brig had sailed from Demerara § 158 for England in December, 1828, had touched at Dominica on the 24th of that month, and had never afterwards been heard of, Vice-Chancellor Knight Bruce, after a lapse of seven years, presumed that the vessel and her crew were lost before the 29th of January, 1829, evidence being given that the average length of a voyage from Dominica to England was under two months, and that the West Indian latitudes were subject to hurricanes, which were so much more prevalent between the first of August and the 10th of January, that premiums for insurance during that time were double what they were at other periods of the year.<sup>1</sup> So, upon an issue of the life or death of a party, the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur; as, if the party, when last heard of, was aged, or infirm, or ill,<sup>2</sup> or had since been exposed to extraordinary peril, such as a storm and probable shipwreck.<sup>3</sup> But the presumption of the common law, independent of the finding of a jury, does not attach to the mere lapse of time short of seven years.<sup>4</sup>

§ 202.<sup>5</sup> When two persons, and especially when two relatives, § 159 have *perished in the same calamity*, such as a wreck, a battle, or a conflagration, it often becomes important, with a view of determining the right of succession to estates, to ascertain who was the *survivor*. Direct proof, however, can seldom be procured in these cases, and, consequently, in the Roman law, and in several other codes, recourse is had to *artificial* presumptions, whenever the particular circumstances connected with the deaths are wholly

<sup>1</sup> *Sillick v. Booth*, 1 Y. & C., Ch. R. 117. See *Ommaney v. Stilwell*, 23 Beav. 328.

<sup>2</sup> *R. v. Harborne*, 2 A. & E. 544, per Ld. Denman; 4 N. & M. 344, S. C.; *Beasley's Trust*, re, 38 L. J., Ch. 159; 7 Law Rep., Eq. 498, S. C.

<sup>3</sup> *Watson v. King*, 1 Stark. R. 121; 4 Camp. 272, S. C.; *Patterson v. Black*, cited 2 Park. Ins. 919, 920. In the case of a missing ship, bound from Manilla to London, on which the underwriters had voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after the absence of only two years, and administration was granted accordingly; In re Hutton, 1 Curt. 595.

<sup>4</sup> See further on this subject, Hubb. Ev. of Suc. 167, et seq., 758, 759.

<sup>5</sup> Gr. Ev. § 29, in part.



unknown. These presumptions are based on the probabilities of survivorship resulting from strength, age, and sex. In the case of a father and son perishing together in the same shipwreck or battle, the Roman law presumes that the son died first, if he was under the age of puberty ; but if he was above that age, that he was the survivor ; upon the principle, that in the former case, the elder is generally the more robust, and in the latter, the younger.<sup>1</sup> The French code has regard to the ages of fifteen and sixty ; presuming that of those under the former age, the eldest survived ; and that of those above the latter age, the youngest survived. If one of these parties were under the age of fifteen, and the other above the age of sixty, the former is presumed to have survived. If both parties were between those ages, but of different sexes, the male is presumed to have survived, unless he were more than a year younger than the female : but if they were of the same sex, the presumption is in favour of the survivorship of the younger, as opening the succession in the order of nature.<sup>2</sup> The same rules were in force in the territory of Orleans, at the time of its cession to the United States, and have since been incorporated into the Code of Louisiana.<sup>3</sup> They have also, with some modifications, been adopted into the State of New York.<sup>4</sup>

§ 203. In cases of this nature the law of England recognises<sup>5</sup> no § 160

<sup>1</sup> Dig. lib. 34, tit. 5 ; De rebus dubiis, lib. 9, § 1, 3 ; Id. i. 16, 22, 23 ; Menoch. de Præs. lib. 1, Quæst. x. n. 8, 9. This rule, however, was subject to some exceptions for the benefit of mothers, patrons, and beneficiaries.

<sup>2</sup> Code Civil, §§ 720, 721, 722 ; Duranton, Cours de Droit Français, tom. 6, pp. 32, 42, 43, 48, 67, 69 ; Rogron, Code Civil, Expli. 411, 412 ; Toullier, Droit Civil Français, tom. 4, pp. 70, 72, 73.

<sup>3</sup> Civ. Code of Louis. art. 930—933 ; Dig. of Civ. L. of Orleans, art 60—63.

<sup>4</sup> N. York Civ. Code, § 1780, tit. 3.

<sup>5</sup> R. v. Dr. Hay, 1 W. Bl. 640. This case, better known as General Stanwix's case, was compromised upon the recommendation of Ld. Mansfield, who said he knew of no legal principle on which he could decide it. See 2 Phillim. R. 268, n. ; Fearn's Posth. Works, 38 ; Doe v. Neopean, 5 B. & Ad 91, 92 ; Underwood v. Wing, 19 Beav. 459, per Romilly, M. R. ; aff. on appeal by Ld. Cranworth, C., assisted by Wightman, J., and Martin, B., 4 De Gex, M. & G. 1 ; Mason v. Mason, 1 Meriv. 308. See Durrant v. Friend, 5 De Gex & Sm. 343 ; Barnett v. Tugwell, 31 Beav. 232. For the cases decided in the old Eccles. Courts, see Wright v. Netherwood, 2 Salk. 593, n. a. by Evans ; more fully reported under the name of Wright v. Sarmuda, 2 Phillim. R.

presumption, either of survivorship, or of contemporaneous death;<sup>1</sup> but, in the total absence of all evidence respecting the particular circumstances of the calamity, the matter will be treated as one incapable of being determined.<sup>2</sup> On one occasion, indeed, Vice-Chancellor Knight-Bruce appears to have expressed an opinion, that a presumption of priority of death might be raised from the comparative age, strength, and skill of the parties; and, in accordance with this view, where two brothers perished by shipwreck, the circumstances being wholly unknown, but it appeared that the one was twenty-eight years of age, and the master of the ship, while the other was under age, and acted as second mate, it was presumed that the elder, as the stronger and more experienced sailor, survived the younger.<sup>3</sup> This case, however, cannot be relied upon as an authority, since it is opposed to a long current of decisions. It remains only to observe, that if any circumstances connected with the death of either party can be proved, the whole question of survivorship may be dealt with as one of fact, and the comparative strength, or skill, or energy, of the two sufferers may then very fairly be taken into account.

§ 204. A rule has been adopted in insurance law, that if a vessel has sailed, and no tidings of her have been received within a reasonable time, she shall be presumed to have *founded* at

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266—277, n. c.; Taylor v. Diplock, id. 261, 278, 280; Selwyn's case, 3 Hagg. Ec. R. 748; In the goods of Murray, 1 Curt. 596. In the brief note of Colvin v. Proc. Gen. 1 Hagg. Ec. R. 92, where the husband, wife, and infant (if any) perished together, the court seems to have held, that the *prima facie* presumption of law was that the husband survived; but the question was not much discussed; and in Satterthwaite v. Powell, 1 Curt. 705, where a husband and wife perished in the same wreck, the court would not presume that he survived, and consequently refused to grant to his representative the administration of property vested in the wife. The subject of presumed survivorship is fully treated in 4 Burge, Com. on Col. & For. L., 11—29; and in Hubb. Ev. of Suc. 186, et seq., and 759—764. See also 2 Kent, Com. 435, 436, 4th ed., n. b.

<sup>1</sup> By the Mahometan law of India, when relatives thus perish together, "it is to be presumed that they all died at the same moment; and the property of each shall pass to his living heirs, without any portion of it vesting in his companions in misfortune." See Baillie's *Moochumudan Law of Inherit.* 172.

<sup>2</sup> Wing v. Angrave, 8 H. of L. Cas. 183; 30 L. J., Ch. 65, S. C.

<sup>3</sup> Sillick v. Booth, 1 Y. & C., Ch. R. 117, 126.

sea.<sup>1</sup> By "tidings" are meant, not mere rumours, but some actual intelligence received from persons capable of giving an authentic account;<sup>2</sup> and, it seems, that in an action on a policy from an English to a foreign port, the presumption of loss will sufficiently arise, from proof that the ship was not heard of in this country after she sailed, without calling witnesses from the port of destination to show that she never arrived there.<sup>3</sup> Neither the law of England, nor the usage of merchants, has fixed any definite period after which the assured may demand payment for his loss, in case no intelligence is received respecting the vessel insured; but a practice has prevailed among insurers of deeming a vessel lost, provided she shall not have been heard of within six months after her departure for any port in Europe, or within twelve months if bound for a greater distance.<sup>4</sup>

§ 205. Another presumption connected with the law of in- § 162  
surance is this, that if a ship, shortly after sailing, shall, without visible or adequate cause, become leaky; or otherwise incapable of performing the voyage insured, she shall be deemed to have

<sup>1</sup> *Green v. Brown*, 2 Str. 1199; *Newby v. Reed*, cited 1 Park, Ins. 148; *Koster v. Reed*, 6 B. & C. 19; 9 D. & R. 2, S. C. But in order to recover on a policy, there must be some evidence, that when the ship left the port of outfit, she was bound upon the voyage insured, *Cohen v. Hinkley*, 2 Camp. 51, per *Ld. Ellenborough*; *Coster v. Innes*, Ry. & M. 333, per *Abbott, C. J.*

<sup>2</sup> *Koster v. Reed*, 6 B. & C. 22, per *Bayley, J.* In that case a witness stated that a few days after the vessel sailed, he *heard* that she had foundered, but that the crew were saved: Held not sufficient to rebut the presumption of loss which arose from the ship never having arrived at her port of destination, and that the plaintiff was neither bound to call any of the crew, nor to show that he was unable to do so.

<sup>3</sup> *Twemlow v. Oswin*, 2 Camp. 85, per *Sir J. Mansfield, C. J.*

<sup>4</sup> 1 Park, Ins. 149. In Spain and France, the time after which insurance losses may be demanded, is fixed by express regulation. By the ordinances of the former, if a ship insured on going to, or coming from, the Indies, is not heard of within a year and a half after her departure from the port of outfit, she is deemed lost, 2 *Magens*, 33; by those of the latter, if the assured receives no news of his ship, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for those of a greater distance, make his session to the underwriters, and demand payment, without being obliged to produce any certificate of the loss, *Ordonnance de la Marine*, liv. 3, t. 6, des *Assur.* Art. 58; 1 Park, Ins. 149.

been unseaworthy at the commencement of the risk.<sup>1</sup> This presumption, however, is not really a proposition of law, capable of shifting the burthen of proof from the insurer to the shipowner, but it is simply an inference of fact which may be drawn by the intelligence of the jury,<sup>2</sup> and which at no time is of so binding a nature, as to induce the court to grant a third trial, when two special juries have already concurred in finding an adverse verdict.<sup>3</sup>

§ 206. The Admiralty Division of the High Court recognises § 162A certain presumptions, which ought to be borne in mind, as they have the effect of technically shifting the burthen of proof. Thus, in cases of collision, if one of the vessels be shown to have been at anchor, the fact so far raises a presumption in her favour, as to impose on the other vessel the necessity of making out her defence.<sup>4</sup> So, if a ship be proved to have been in stays at the time of the collision, she is presumed to have been unable to avoid it; and the burthen of proof rests on the opposite side to establish, either that the vessel was improperly put in stays,—whatever that means,—or that the damage was occasioned by the stress of weather, or by other unavoidable accident.<sup>5</sup> Again, in the case of a collision between two ships, the “person in charge,”—or, in other words, the master,—of each ship is bound to render assistance to the other vessel, and to stay by her for that purpose; and if he fail to do so, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act.<sup>6</sup> So, the infringement of any regulation for preventing collisions at sea,<sup>7</sup> which is made under the Merchant Shipping Act Amendment Act,<sup>8</sup> 1862, raises a presumption of blame as against the infringer, unless he can show

<sup>1</sup> *Watson v. Clark*, 1 Dow, 344; *Munro v. Vandam*, 1 Park, Ins. 469, per *Ld. Kenyon*; *Parker v. Potts*, 3 Dow, 23.

<sup>2</sup> *Pickup v. Thames Ins. Co.*, L. R., 3 Q. B. D. 594, per *Ct. of App.*; 47 L. J., Q. B. 749, S. C. This case deserves an attentive perusal.

<sup>3</sup> *Foster v. Steele*, 3 Bing. N. C. 892; 5 Scott, 25 S. C., per *Tindal*, C. J. and *Park*, J.; *Vaughan and Coltman, Jas.*, diss.

<sup>4</sup> *The Bothnia*, Lush. Adm. R. 52.

<sup>5</sup> *The Sea Nymph*, Lush. Adm. R. 23.

<sup>6</sup> *The Queen*, 2 Law Rep., Adm. & Ecc. 354; 36 & 37 V., c. 85, § 16.

<sup>7</sup> Made under Order in Council, of 14 Aug. 1879, and which came into operation on 1st Sept. 1880; see L. R., 4 P. D. 241; and 49 L. J., Ord and Rules, p. 1. This Order is now annulled, and New Regulations substituted, by an Order in Council, gazetted on 19th Aug., 1884.

<sup>8</sup> 25 & 26 V., c. 63.

either that circumstances "made a departure from the regulation necessary,"<sup>1</sup> or that the infringement charged could not by possibility have contributed to the collision.<sup>2</sup> Again, if a salvor's vessel has been injured or lost while engaged in the salvage service, the Admiralty Division presumes, *prima facie*, that such injury or loss was caused by the necessities of the service, and not by the salvor's default.<sup>3</sup>

§ 207. By the principles, too, of our maritime law, every § 163 reasonable presumption must be made in favour of the rights of property in the owners, whenever any question of derelict is mooted between them and the salvors. Thus, the 33rd article of the laws of Oleron enacts, that "if from any ship or other vessel have been cast overboard several goods or merchandises which are in chests well locked and made fast; or books so well secured and so well conditioned that they may not be damnified by salt water; in such cases it is to be presumed that they who did cast such goods overboard do still retain an intention, hope, and desire of recovering the same: for which reason, such as shall happen to find such things, are obliged to make restitution thereof to him who shall make a due inquiry after them." On the principle of this enactment,—which has been the law for the last seven hundred and fifty years, and which is still in full force,<sup>4</sup>—it has repeatedly been held, that where salvors make a claim, as in a case of dereliction, it will not suffice for them merely to prove that they found the vessel at sea apparently abandoned, but they must go further and prove that the master and crew, when they left the vessel, did so without any hope, expectation, or intention of being able to return, or, in the technical language of the law, *sine spe recuperandi*.<sup>5</sup>

<sup>1</sup> 36 & 37 V., c. 85, § 17. These words mean "absolutely necessary," leaving no margin for discretion, *Stoomvaart, &c. v. Pen. & Orien. St. Nav. Co. L. R.*, 5 App. Cas. 876, per Dom. Pr. But § 17 does not apply to an infringement of the Thames Rules; *The Harton*, L. R., 9 P. D. 44.

<sup>2</sup> *The Fanny Carvill*, 44 L. J., Adm. 34 per P. C.; *Law Rep.*, 4 Adm. & Ecc. 417, S. C. nom. *The Magnet*; *The Englishman*, L. R. 3 P. D. 18; 47 L. J., P. D. & A. 9, S. C.; *The Tirzah*, 48 L. J., P. D. & A. 15; P. R., 4 P. D. 33, S. C.; *Emery v. Cichero*, re *The Arklow*, 53 L. J., P. C. 9.

<sup>3</sup> *The Thomas Blyth*, Lush. Adm. R. 16.

<sup>4</sup> In re *Cosmopolitan*, 6 Ecc. & Mar. Cas., Supp. xxviii, per Dr. Stock.

<sup>5</sup> *Id.* xvii, and cases there cited. The judgment of the court in this case is 15 LAW OF EVID.—V. I. (3091)

§ 208. It here deserves notice that a ship-owner,—except so far as his liability is limited by the Merchant Shipping Acts, 1854 and 1862,<sup>1</sup>—is *prima facie* presumed to be responsible for any damage occasioned by negligence in the navigation of his vessel. In order, therefore, to bring himself within the exemption from liability conferred upon him by the first named Act where pilotage is compulsory,<sup>2</sup> it is not sufficient merely to show that he had a pilot on board at the time of the accident, and that the presence of such pilot was compulsory,<sup>3</sup> but the burthen of proof lies upon him to establish the further fact, that the damage was occasioned exclusively by the pilot's fault.<sup>4</sup> In using this language it is not meant

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very elaborate, and well deserves an attentive perusal. The Admiralty Division will never decree more than a moiety of the value of the article saved for mere salvage, independent of dereliction, *Gore v. Bethel*, 12 Moo. P. C. R. 189; *The Inca*, Swab. Adm. R. 370.

<sup>1</sup> 17 & 18 V., c. 104, §§ 503—516, and 388; 25 & 26 V., c. 63, § 54; see *The Rajah*, 3 Law Rep., Adm. & Ecc. 539.

<sup>2</sup> § 388 enacts, that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law." See *Conserv. of Riv. Thames v. Hall*, 37 L. J., C. P. 163; 3 Law Rep., C. P. 415, S. C.; *Prowse v. The European & Amer. St. Shipping Co.*, 13 Moo. P. C. R. 484; *Lush. Adm. R. 103*, S. C. nom. *The Peerless*; *The Clan Gordon*, L. R., 7 P. D. 190. This statutable law is applicable to a case, where the collision has occurred within the limits of a foreign port; *The Halley*, 2 Law Rep., P. C. 193; overruling S. C., as decided per Sir R. Phillimore; 2 Law Rep., Adm. & Ecc. 3; 37 L. J., Adm. 1, S. C. As to the meaning of the word "compulsory," see *Gen. St. Nav. Co. v. Brit. & Col. St. Nav. Co.*, 3 Law Rep., Ex. 330; 37 L. J., Ex. 194, S. C.; 38 L. J., Ex. 97, S. C. in Ex. Ch.; and 4 Law Rep., Ex. 238. As to the meaning of the term "acting in charge," see *The Princeton*, 47 L. J., Adm. 33; L. R. 3 P. D. 90, S. C.; *The Guy Mannering*, L. R., 7 P. D. 132, per Ct. of App.; 51 L. J., P. D. & A. 57, S. C. A pilot being on board a towed vessel will not exempt the tug from liability; *The Mary*, 48 L. J., P. D. & A. 66; *The Siquasi*, L. R., 5 P. D. 241; 50 L. J., P. D. & A. 5, S. C. See also, *Spaight v. Tedcastle*, L. R., 6 App. Cas. 217, per Dom. Proc. in App. from Ireland.

<sup>3</sup> *The Earl of Auckland*, 30 L. J., Pr. Mat. & Adm. 121; *Lush. Adm. R. 164*, S. C.; S. C. nom. *Malcomson v. Baldock*, 15 Moo. P. C. R. 304; *The Hanna*, 36 L. J., Adm. 1; *The Annapolis*, *Lush. Adm. R. 295*; *The Lion*, *Owners v. The York-Town, Owners*, 38 L. J., Adm. 51; 2 Law Rep., P. C. 525, S. C.

<sup>4</sup> *Hammond v. Rogers*, 7 Moo. P. C. R. 160; *Pollock v. M'Alpin*, id. 427; *Bates v. Don Pablo Sra*, 10 Moo. P. C. R. 467; *The Carrier Dove*, 1 B. & *Lush. Adm. R. 113*; *The Iona*, 1 Law Rep., P. C. 426; 4 Moo. P. C., N. S.

that the ship-owner will be obliged to exonerate himself by indefinite negation, but it will suffice for him in the first instance to show that the pilot's fault occasioned the damage, leaving his opponent, if he can, to establish as against the ship-owner a case of contributory negligence.<sup>1</sup> The legal owner of a ship is also *prima facie* liable to pay for all such repairs and stores ordered by the master,<sup>2</sup> as are necessary for the equipment and navigation of the ship in the voyage of trade in which she is employed; for the master, in the absence of all evidence to the contrary,<sup>3</sup> is presumed to be the agent of the owner to give all needful orders, and he consequently has authority to pledge the owner's credit for goods supplied or work done in pursuance of such orders.<sup>4</sup>

§ 209. In cases respecting the national character of a man, who § 165 either has no fixed place of residence, or who has two homes, and the scale is almost evenly balanced between them, the legal presumption is in favour of what is called the *forum originis*, or *domicil of origin*; by which is meant, not the place where he may chance to have been born, but the home of his parents.<sup>5</sup> When a man's

336, S. C.; *The Minna*, 2 Law Rep., Adm. & Ecc. 97; *The Valesquez*, 1 Law Rep., P. C. 494; 4 Moo. P. C., N. S. 426; 36 L. J., Adm. 19 S. C.; *The Victoria*, 1 Ir., Eq. 336; *The General De Caen*, Swab. Adm. R. 9; *The Mobile*, id. 69 & 127; *The Admiral Boxer*, id. 193; *The Schwalbe*, Lush. Adm. R. 239; 14 Moo. P. C. R. 241, S. C. nom. *North German Lloyd St. Ship Co. v. Elder*; *The Netherlands St. Boat Co. v. Styles*, 9 Moo. P. C. R. 286; *The Protector*, 1 Rob. Adm. 45; *The Diana*, id. 181; 4 Moo. P. C. R. 11, S. C.; *Rodrigues v. Melhuish*, 10 Ex. R. 110; *Wood v. Smith*, Re *The City of Cambridge*, 43 L. J., Adm. 11; 5 Law Rep., P. C. 451, S. C.; *Clyde Navig. Co. v. Barclay*, L. R., 1 App. Cas. 790; *The Meteor*, I. R., 9 Eq. 567.

<sup>1</sup> *Clyde Navig. Co. v. Barclay*, L. R., 1 App. Cas. 790; *The Daioz*, 47 L. J., P. D. & A. 1; *The Marathon*, 48 L. J., P. D. & A. 17.

<sup>2</sup> As to the authority of a ship's husband to bind the owners, see *Thomas v. Lewis*, L. R., 4 Ex. E. 18.

<sup>3</sup> *Mitcheson v. Oliver*, 5 E. & B. 419; *Hibbs v. Ross*, 1 Law Rep., Q. B. 534; 35 L. J., Q. B. 193; 7 B. & S. 655, S. C.; *Gunn v. Roberts*, 9 Law Rep., C. P. 331; 43 L. J., C. P. 233, S. C.

<sup>4</sup> *Frost v. Oliver*, 2 E. & B. 301; *Beldon v. Campbell*, 6 Ex. R. 886; *The Great Eastern*, 2 Law Rep., Adm. & Ecc. 88; *Edwards v. Havell*, 15 Cam. B. 107. See *Wallace v. Fielden*, 7 Moo. P. C. R. 398; *Tronson v. Dent*, 8 Moo. P. C. R. 419; *Myers v. Willis*, 17 Com. B. 77; 18 Com. B. 886, S. C.; *Brodie v. Howard*, 17 Com. B. 109; *Hackwood v. Lyall*, id. 124; *Mackenzie v. Pooley*, 11 Ex. R. 638; *Whitwell v. Perrin*, 4 Com. B., N. S. 412. See *Atlantic Mut. Ins. Co. v. Huth*, L. R., 16 Ch. D. 474.

<sup>5</sup> *Munro v. Munro*, 7 Cl. & Fin. 842; *Bell v. Kennedy*, 1 Law Rep., H. L. (3093)

domicil of origin is not known, or when his intention to abandon it can be proved, the law presumes, *prima facie*, that the place of his actual residence is the place of his acquired domicil:<sup>1</sup> but this presumption may be easily rebutted by showing that he has merely come to live in the country where he is staying, either for a limited period, or for a special purpose, or that in point of fact he has no *animus manendi*, no settled intention of making that country his place of permanent abode.<sup>2</sup> When a married man has two houses situate in different countries, in both of which he is in the habit of residing, his home or domicil will generally be presumed to be that house, in which his wife and his establishment of servants usually remain when he is at the other.<sup>3</sup> In consequence of the legal presumption in favour of the domicil of origin,<sup>4</sup> slighter evidence is required to warrant the conclusion that a man has intended to abandon an acquired domicil, and to resume his domicil of origin, than is necessary to justify the conclusion that he has determined to abandon this last, and to acquire a new domicil.<sup>5</sup>

§ 210. The presumption, too, against the acquisition of a new domicil will be stronger in the case of a person, who is alleged to have gained it in a foreign land, than it would be, were the domicil in a country where the party would not be a foreigner.<sup>6</sup>

Sc. 307; *Somerville v. Somerville*, 5 Ves. 750; *Forbes v. Forbes*, 1 Kay, 364; *Crookenden v. Fuller*, 29 L. J., Pr. & Mat. 1; 1 Swab. & Trist. 441, S. C.; *Whicker v. Hume*, 28 L. J., Ch. 396; in Dom. Proc. 7 H. of L. Cas. 124, S. C.; *Lord v. Colvin*, 28 L. J., Ch. 361, per Kindersley, V.-C.; *Hodgson v. De Beauchesne*, 12 Moo. P. C. R. 285.

<sup>1</sup> *Bempdè v. Johnstone*, 3 Ves. 198, per Ld. Thurlow; *Bruce v. Bruce*, 2 B. & P. 230; n. per id.; 6 Br. P. C. 566, S. C.; *The Diana*, 5 Rob. Adm. 60; *The Ocean*, id. 90; *The President*, id. 277; *Guier v. O'Daniel*, 1 Binn. 349, n.

<sup>2</sup> *Bruce v. Bruce*, 2 B. & P. 230, n.; 6 Br. P. C. 566, S. C.; *Bell v. Kennedy*, 1 Law Rep., H. L. Sc. 307; *Lord v. Colvin*, 28 L. J., Ch. 361, 366; *Jopp v. Wood*, 4 De Gex, J. & S. 616; *King v. Foxwell*, L. R., 3 Ch. D. 518; 45 L. J. Ch. 693, S. C.; *Gillis v. Gillis*, I. R., 8 Eq. 597; *The Harmony*, 2 Rob. Adm. 322; *Guier v. O'Daniel*, 1 Binn. 349, n.

<sup>3</sup> *Forbes v. Forbes*, 1 Kay, 364, per Wood, V.-C.; *Platt v. Att.-Gen. of New S. Wales*, L. R., 3 App. Cas. 336, 343, in J. C.; 47 L. J., P. C. 26, S. C.

<sup>4</sup> See *Udny v. Udny*, 1 Law Rep., H. L. Sc. 441; and *King v. Foxwell*, L. R., 3 Ch. D. 518; 45 L. J., Ch. 693, S. C.

<sup>5</sup> *Lord v. Colvin*, 28 L. J., Ch. 373, per Kindersley, V.-C.; *Douglas v. Douglas*, 12 Law Rep., Eq. 642, per Wickens, V.-C.; 41 L. J., Ch. 74, S. C.

<sup>6</sup> *Id.*; *Whicker v. Hume*, id. 399, 400, per Ld. Cranworth; 7 H. of L. Cas. (3094)



For instance, the court would more readily decide that a Scotchman had acquired an English, or an Anglo-Indian, domicile than a French one; for a man's acquisition of a domicile in a foreign country is obviously a most serious matter, since it not only renders the validity of his testamentary acts, and the disposition of his personal property, liable to be governed by foreign laws, but it is calculated to involve him in a conflict of national duties, and to subject him to the embarrassments of a divided allegiance.<sup>1</sup> The law presumes that the domicile of a wife is the domicile of her husband; and this presumption is, as a general rule, conclusive.<sup>2</sup> An exception, however, might possibly be recognized in the case of a judicial separation pronounced by competent authority,<sup>3</sup> or where the husband had abjured the realm, deserted his wife, and established himself permanently in a foreign country, or had committed felony, and been transported.<sup>4</sup>

§ 211. With respect to copyhold property, the law presumes, in § 166 the absence of proof of any specific custom in the manor, first, that estate tail cannot be created, and next, that if they can, they are liable to be barred either by a common surrender, or by a surrender to the use of a will.<sup>5</sup>

§ 212. Where the limitation of a peerage cannot be discovered, § 167 the law presumes that it descends, not to the heirs general, but to the heirs male of the body of the original grantee.<sup>6</sup>

§ 213.<sup>7</sup> A spirit of comity is presumed to exist among nations; § 168 and, consequently, it has become a maxim of international law that

124, S. C.; *Hodgson v. De Beauchesne*, 12 Moo. P. C. R. 285, 317; *Crookenden v. Fuller*, 29 L. J., Pr. & Mat. 1, 8; *Swab. & Trist*. 441, S. C. <sup>1</sup> Id.

<sup>2</sup> *Dolphin v. Robins*, 7 H. of L. Cas. 390; 3 Macq. Sc. Cas. H. of L. 563 S. C.

<sup>3</sup> 7 H. of L. Cas. 416, per Ld. Cranworth; 420, per Ld. Kingsdown.

<sup>4</sup> Id. 418, 419, per Ld. Cranworth

<sup>5</sup> *Gould v. White*, 1 Kay, 683; *Radford v. Wilson*, 3 Atk. 815; *Moore v. Moore*, 2 Ves. Sen. 596, 603.

<sup>6</sup> *Glencairn Peer*, 1 Macq., Sc. Cas. H. of L. 444, recognised and confirmed in *Montrose Peer*. id. 401; *Herries' Peer*. 3 id. 585, 588, 600, 603; 2 Law Rep., H. L. Sc. 258, S. C.; *Breadalbane Peer*. 2 Law Rep., H. L. Sc. 269.

<sup>7</sup> Gr. Ev. § 43, in part.

when the solution of any legal question depends upon the law of a foreign state,—as for example, when a contract made in one country is sought to be enforced in another,—courts of justice will, in the silence of any positive rule affirming or denying or restraining the operation of such foreign laws, presume the adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interest.<sup>1</sup>

§ 214.<sup>2</sup> PRESUMPTIONS OF FACT, usually treated as composing the *second general head* of presumptive evidence, can hardly be said with propriety to belong to this branch of the law. They are in truth but mere arguments, of which the major premiss is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions, and the validity of arguments. They depend upon their own natural efficacy in generating belief, as derived from those connexions, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the system of jurisprudence, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered.<sup>3</sup>

§ 215. These presumptions remain the same under whatever law § 170

<sup>1</sup> *Bk. of Augusta v. Earle*, 13 Pet. 519, 589; Story, *Conf. §§ 36–38*; Huber, *de Conf. Leg.*, lib. 1, tit. 2, § 2, p. 538.

<sup>2</sup> *Gr. Ev.* § 44, almost verbatim, except the note.

<sup>3</sup> See Henry VI., Pt. ii., Act iii., Sc. 2, where Warwick, after contemplating “Duke Humphrey’s timeless death,” is made by our great poet of nature to comment thus:—

“Who finds the heifer dead, and bleeding fresh,  
And sees fast by a butcher with an axe,  
But will suspect ’twas he that made the slaughter?”

See, also, Smollett’s “Adventures of Roderick Random,” Ch. xx.

the legal effect of the facts, when found, is to be decided.<sup>1</sup> They embrace all the relations between the fact requiring proof and the fact or facts actually proved, whether such relations be direct or indirect, and whether they be physical or moral. A single circumstance may raise the inference, as well as a long chain of circumstances. For instance, the decision of King Solomon as to which of the two harlots was the mother of the living child, rested on the general presumption<sup>2</sup> in favour of maternal affection, and on the sole fact that the "bowels" of the real mother "yearned upon her son," and she would in no wise consent to his being slain.<sup>3</sup> So,—to pass from history to fiction,—the famous judgment of Sancho Panza acquitting the herdsman charged with rape,<sup>4</sup> was founded on the ascertained fact that the prosecutrix successfully resisted the attempt to take her purse, which the accused made by order of the court. "Sister of mine," said honest Sancho, to the forceful but not forced damsel, "had you shown the same, or but half as much courage and resolution in defending your chastity, as you have shown in defending your money, the strength of Hercules could not have violated you."

§ 216.<sup>5</sup> Although it is the exclusive province of the jury to fix the due weight which ought to be given to presumptions of fact, juries are usually aided in their labours by the advice and instruction of the judge, more or less strongly urged, at his discretion. 2 171

<sup>1</sup> See 3 St. Ev. 932; 6 Law Mag. 370. This subject has been successfully illustrated in Wills, Cir. Ev. *passim*.

<sup>2</sup> It may deserve notice that, apart from this presumption, the sacred narrative contains not one word to show that, after all, the judgment was right, that is, that it was really in accordance with the fact. The proverbial wisdom of the decision has, all along, been *assumed* rather than *proved*.

<sup>3</sup> 1 Kings, ch. 3, vv. 16—28. Suetonius, in his life of the Emperor Claudian, ch. 15, states that the monarch discovered a woman to be the real mother of a young man, whom she refused to acknowledge, by commanding her to marry him; for rather than commit incest she confessed the truth. Diodorus Siculus also speaks of a King of Thrace, who discovered which of three claimants was the son of a deceased king of the Cimmerians, by ordering each of them to shoot an arrow into the dead body. Two obeyed without hesitation, but the other refused. See Bagster's Comprehensive Bible, note B. to v. 25 of ch. 3 of 1 Kings.

<sup>4</sup> Don Quixote, part 2, book 3, ch. 13.

<sup>5</sup> Gr. Ev. § 45, in part.

Indeed, some few general propositions in regard to matters of fact, and the weight of testimony, are now universally taken for granted in the administration of justice, and are sanctioned by the usage of the bench.<sup>1</sup> Such for instance, is the caution given to juries, to regard with distrust the testimony of an accomplice, unless it be materially confirmed by other evidence. There is no rigid presumption of the common law against such testimony; yet experience has shown that it is little worthy of credit: and on this experience the usage is founded.<sup>2</sup> A similar caution should prevail in regard to mere *verbal admissions* of a party, this kind of evidence being subject to much imperfection and mistake.<sup>3</sup> So, if a witness be detected in telling a falsehood in one part of his testimony, the jury will be advised to place little reliance on the remainder of his narrative.

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<sup>1</sup> See New York Civ. Code, § 1852.

<sup>2</sup> See further as to the corroboration of accomplices, post, §§ 967—971.

<sup>3</sup> 5 C. & P. 542, n., per Parke, J.; R. v. Simons, 6 C. & P. 541, per Alderson, B.; Williams v. Williams, 1 Hagg. Cons. 304. See post, §§ 861, 862.

## PART II.

## RULES GOVERNING THE PRODUCTION OF TESTIMONY.

## CHAPTER I.

## CORRESPONDENCE OF EVIDENCE WITH ALLEGATIONS; SUBSTANCE OF ISSUE; VARIANCE; AND AMENDMENT.

§ 217.<sup>1</sup> THE production of evidence on the trial of an action is § 172 governed by certain principles, which may be treated under four general rules. *First*, the evidence must correspond with the allegations, but the substance only of the issues need be proved; *secondly*, the evidence must be confined to the points in issue; *thirdly*, the burthen of proving a proposition at issue lies on the party holding the substantial affirmative; and *fourthly*, the best evidence, of which the case in its nature is susceptible, must always be produced. These rules will now be considered in their order.

§ 218.<sup>2</sup> The pleadings are composed of the written allegations § 173 of the parties, terminating in propositions distinctly affirmed on one side, and denied on the other, called the issues. If these are propositions of fact, the *first rule*, which it is important to remember, is, that the *evidence must correspond with the allegations, but that it is sufficient if the substance of the issues be proved*. As one of the main objects of pleading is to apprise the parties of the specific nature of the questions to be tried, and as this object would be defeated, if either party were at liberty to prove facts essentially different from those which he has stated on the record, as constituting his claim or charge on the one hand, or his defence on the other, the necessity of establishing such a general rule as the present becomes apparent, and the only remaining question concerns

<sup>1</sup> Gr. Ev. § 50, slightly.

<sup>2</sup> Gr. Ev. § 51, in part, as to first six lines. (3099)

its limitation and extent.<sup>1</sup> Great strictness was formerly required in the application of this rule; almost every disagreement between the allegation and the proof, except in matters clearly impertinent, being held to constitute what was called a *variance*, the consequences of which were as fatal to the party on whom the proof lay, as a total failure of evidence.

§ 219. Thus, in an action for the breach of warranty of a horse, { 173 where the declaration stated a general warranty, and the proof was that the defendant had warranted the horse sound everywhere except a kick on the leg, the plaintiff was nonsuited on account of this variance, although the unsoundness of which he complained, and which he established at the trial, was a dropsy.<sup>2</sup> So, where a declaration in ejectment described the premises as situate in the united parishes of St. Giles-in-the-Fields, and St. George, Bloomsbury, and it appeared that the parishes were united by Act of Parliament for the maintenance of the poor, but for no other purpose, and that the premises in question were in the parish of St. George, Bloomsbury, this was held to be a fatal variance, though it was idle to suppose that the defendant could have been misled by the misdescription.<sup>3</sup> To give but one more instance where hundreds might easily be furnished, a plaintiff was nonsuited in an action for defamation, because the libel, as set out on the record, imputed to him "mismanagement or ignorance," while, according to the

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<sup>1</sup> In the case of *Caton v. Caton*, 7 Ec. & Mar. Cas. 28, Dr. Lushington very sensibly observed: "The maxim of the Eccles. Courts, and I may say of all other courts, is to decide secundum allegata et probata. There must be both charge and evidence; the party cited is entitled to know the specific charge for the purpose of defence. \* \* The difficulty I feel is to avoid the error of adhering to this rule with *pedantic strictness*, and, on the other hand, not to weaken a rule which is founded on one of the great principles of justice." See *Malcomson v. Clayton*, 13 Moo. P. C. R. 206, per Ld. Chelmsford; and *The Ann*, Lush. Adm. R. 55, in which last case little trouble seems to have been taken by the learned judges of the Privy Council to avoid the "pedantic strictness" alluded to by Dr. Lushington. See, also, *Tyrer v. Henry*, 14 Moo. P. C. R. 83; *Kilgour v. Alexander*, id. 177; *The Haswell*, 2 B. & Lush., Adm. R. 247; *The Amalia*, id. 311.

<sup>2</sup> *Jones v. Cowley*, 4 B. & C. 445, declared most justly by Alderson, B., to be "a great disgrace to the English law," in *Hemming v. Parry*, 6 C. & P. 580.

<sup>3</sup> *Goodtitle v. Lammiman*, 2 Camp. 274.

evidence, the expressions really used in the libel, which had been destroyed, were "ignorance or inattention."<sup>1</sup>

§ 220. The attention of the Legislature being at length drawn § 174 to the flagrant injustice which was thus constantly occasioned, a partial remedy was provided in 1828 by the Act of 9 G. 4, c. 15;<sup>2</sup> but as that statute, though a salutary measure so far as it went, was found to afford a very ineffectual remedy for an evil which all suitors felt to be highly oppressive, larger powers of amendment were granted in 1833 to the English judges, and in 1840 to the Irish judges, by the respective Acts of 3 & 4 W. 4, c. 42, §§ 23 & 24,<sup>3</sup> and 3 & 4 V., c. 105, §§ 48 & 49. In 1852, the Legislature again interposed, and by §§ 34, 35, 37 & 222<sup>4</sup> of the Common Law Procedure Act,<sup>5</sup> and §§ 49 & 53,<sup>6</sup> of the Equity Procedure Act of the same year,<sup>7</sup> conferred on the courts additional powers of granting amendments. In the Common Law Procedure Acts of 1854 and 1860 further clauses were inserted, authorising the amendment of "all defects and errors in any proceedings under the provisions" of those Acts respectively, "if duly applied for;"<sup>8</sup> and the Irish Common Law Procedure Act of 1853 also empowered the judges in that country to amend "all defects and errors in any writ, pleading, record, or other proceeding in civil causes."<sup>9</sup>

§ 221. The law relating to amendments was not further altered till the Rules of Court framed under the Judicature Acts of 1873 and 1875 came into operation. Those rules,—which introduced into the different Divisions of the Supreme Court a more lax practice than formerly prevailed,—were annulled in 1883; and the rules,

<sup>1</sup> Brooks v. Blanshard, 1 C. & M. 779; 3 Tyr. 844, S. C.

<sup>2</sup> Repealed as to Sup. Ct. in Eng., except as to criminal proceedings, by 42 & 43 V., c. 59.

<sup>3</sup> Repealed by 44 & 45 V., c. 59.

<sup>4</sup> Repealed by 46 & 47 V., c. 49.

<sup>5</sup> 15 & 16 V., c. 76. See corresponding sections in the Irish Act of 16 & 17 V., c. 113, §§ 85—91.

<sup>6</sup> Repealed by 44 & 45 V., c. 59.

<sup>7</sup> 15 & 16 V., c. 86. See corresponding sections in the Irish Act, 30 & 31 V., c. 44, §§ 154, 158.

<sup>8</sup> 17 & 18 V., c. 125, § 96; 23 & 24 V., c. 126, § 36. Repealed by 46 & 47 V., c. 49.

<sup>9</sup> 16 & 17 V., c. 113, § 231, Ir.

which now regulate the amendment of proceedings in the Supreme Court, are embodied in Orders XVI, XIX, and XXVIII of the new Rules of that year.

§ 221A. It should be specially noted that not one of these Orders has any effect on *criminal* proceedings, or on proceedings for divorce or other matrimonial causes; but that the first two differ from the third in this respect, that the former are inoperative in all proceedings, either on the Crown side, or on the Revenue side, of the Queen's Bench Division, while the last applies to all *civil* proceedings on the Crown side, including mandamus, prohibition, and quo warranto, and to all proceedings on the Revenue side, of the same Court.<sup>1</sup>

§ 222. The three most important rules of Order XVI are the 2nd, the 11th, and the 12th.<sup>2</sup> The 2nd provides, that, "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge, may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be *substituted* or *added* as *plaintiff*, upon such terms as may be just." An application under this rule cannot be made *ex parte*,<sup>3</sup> nor can it succeed unless there has been a *bona fide* mistake;<sup>4</sup> but such mistake may be one of law as well as of fact.<sup>5</sup> The court must also be satisfied that the person, whose name is proposed to be added, has consented to that step, or, at least, that his interests have been duly protected.<sup>6</sup>

§ 223. Rule 11 provides that "no cause or matter shall be de-

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<sup>1</sup> Ord. LXVIII., RR. 1 & 2.

<sup>2</sup> See also RR. 1 & 4 of this Order, which respectively render amendments unnecessary in cases where too many plaintiffs or defendants have been joined. See *Child v. Stenning*, 46 L. J., Ch. 523; L. R., 5 Ch. D. 695, S. C.; *Booth v. Briscoe*, L. R., 2 Q. B. D. 496.

<sup>3</sup> *Tildesley v. Harper*, L. R., 3 Ch. D. 277, per Hall, V. C.

<sup>4</sup> *Clowes v. Hilliard*, L. R., 4 Ch. D. 413, per Jessel, M. R.

<sup>5</sup> *Duckett v. Gover*, L. R., 6 Ch. D. 82, per Jessel, M. R.; 46 L. J., Ch. 407, S. C.

<sup>6</sup> *Turquand v. Fearon*, L. R., 4 Q. B. D. 280.



feated by reason of the *misjoinder* or *nonjoinder* of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be *struck out*, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be *added*.”<sup>1</sup>

224. Rule 12 provides, that “any application to add, or strike out, or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or *at the trial* of the action in a summary manner.” It would seem that, under this Rule, a County Court Judge might amend a misjoinder of defendants in a cause sent to him for trial from the High Court.<sup>2</sup> Order XIX. has only one rule bearing on the subject,<sup>3</sup> and that provides, “that the court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading, which may be unnecessary, or scandalous, or which may tend to prejudice,<sup>4</sup> embarrass,<sup>5</sup> or delay the fair trial of the action ; and may in any such case, if they or he shall think

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<sup>1</sup> The Rule goes on to provide, that if a plaintiff be added, it must be with his consent in writing, and that if a defendant be added, he must be served with a summons or a notice.

<sup>2</sup> See *Bennison v. Walker*, 7 Law Rep., Ex. 143.

<sup>3</sup> R. 27

<sup>4</sup> As to when a plaintiff will not be held to have prejudiced the fair trial of an action by asking for alternative relief, see *Bagot v. Easton*, 47 L. J., Ch. 225, per Ct. of App.

<sup>5</sup> *Heap v. Marris*, L. R., 2 Q. B. D. 630 ; 46 L. J., Q. B. 761, S. C. ; *Davy v. Garrett*, L. R., 7 Ch. D. 473, per Ct. of App. ; 47 L. J., Ch. 218, S. C. ; *Stokes v. Grant*, L. R., 4 C. P. D. 25 ; *Philippe v. Philipps*, 48 L. J., Q. B. 135, per Ct. of App. ; L. R., 4 Q. B. D. 127, S. C. This last case is important as showing what statements must be alleged in an action for the recovery of land of which the plaintiff has never been in possession.

fit, order the costs of the application to be paid as between solicitor and client."

§ 225. Order XXVIII. is as follows :—"AMENDMENT.<sup>1</sup>

1. The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement<sup>2</sup> or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

2. The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

3. A defendant who has set up any counter-claim or set-off may, without any leave, amend such counter-claim or set-off at any time before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence.

4. Where any party has amended his pleading under either of the last two preceding rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the court, or a judge, to disallow the amendment, or any part thereof, and the court or judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just.<sup>3</sup>

5. Where any party has amended his pleading under Rule 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time he then has to plead, or within eight days from the delivery of the amendment, whichever shall last expire ; and in case the opposite party has pleaded before the deli-

<sup>1</sup> As to amendment of pleadings in the Consistory Ct. of London, see Reg. Gen. of 1877, relating to that court, Ord. III.

<sup>2</sup> See *Cornish v. Hockin*, 1 E. & B. 602 ; *Leigh v. Baker*, 2 Com. B., N. S. 367.

<sup>3</sup> See *Bourne v. Coulter* 53, L. J., Ch. 699, where held by Kay, J., that when a plaintiff had amended his claim by altering the entire cause of action, the proper course for the defendant was to apply to the Court to disallow the amendment, or to allow it on terms

very of the amendment, and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.<sup>1</sup>

6. In all cases not provided for by the preceding rules of this Order, application for leave to amend may be made by either party to the court, or a judge, or to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise, as may be just.

7. If a party, who has obtained an order for leave to amend, does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become ipso facto void, unless the time is extended by the court or a judge.

8. An indorsement or pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them on writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the document as amended.

9. Whenever any indorsement or pleading is amended, the same, when amended, shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz ;—

‘Amended            day of            ,            , pursuant to order of  
dated the            of            .’

10. Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same.

11. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court, or a judge, on motion or summons without an appeal.

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<sup>1</sup> See *Boddy v. Wall*, 47 L. J., Ch. 112; L. R., 7 Ch. D. 164, S. C.  
(3105)

12. The court or a judge may at any time, and on such terms as to costs or otherwise as the court or judge may think just, amend any defect or error in any proceedings;<sup>1</sup> and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

13. The costs of and occasioned by any amendment made pursuant to Rules 2 & 3 of this Order shall be borne by the party making the same, unless the court or a judge shall otherwise order."

§ 226. From these Rules it will be seen, 1st, that the court or a judge may now, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings; 2nd, that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy; 3rd, that, without leave, but subject to the risk of having to pay costs, the plaintiff may amend his statement of claim, and the defendant may amend his counterclaim or set-off; 4th, that the application for leave to amend any pleading may be made by either party to the court or a judge, or to the judge at the trial of the action; 5th, that pleadings may be amended by striking out any scandalous or embarrassing matter; and lastly, that any of these respective amendments may be allowed upon such terms as to costs or otherwise as may be just.

§ 227. The powers of amendment conferred on the judges by these rules will unquestionably be productive of signal benefit to suitors, if, in furtherance of this salutary design, they are exercised, as they ought to be, in a liberal spirit.<sup>2</sup> As yet however no very

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<sup>1</sup> See the *Immacolata Concezione*, L. R., 9 P. D. 42, where the admiralty judge, under this Rule, sent back a special case to be amended by the Registrar.

<sup>2</sup> See *Parry v. Fairhurst*, 2 C. M. & R. 196, per Alderson, B.; *Sainsbury v. Matthews*, 4 M. & W. 347, per Parke, B.; *Ward v. Pearson*, 5 M. & W. 18, per id.; *Evans v. Fryer*, 10 A. & E. 615, per Williams, J.; *Pacific St. Navig. Co. v. Lewis*, 16 M. & W. 792, per Pollock, C. B.; *Smith v. Knowelden*, 2 M. & Gr. 561; 9 Dowl. 402, S. C. See, also, *St. Losky v. Green*, 9 C. B., N. S. 376, per Ryles, J., who observes in the true spirit of an enlightened law reformer,—“Various statutes have, from time to time for more than 500 years, been passed, from the 14 Ed. 3, c. 6, downwards, to facilitate amendments, but the strict and almost perverse construction which the judges put

important decisions have been pronounced upon the subject, though a few cases, determined under the Rules of 1875, will serve in some degree to illustrate the operation of the new law.

§ 228. Perhaps the most important of these cases is that of *Budding v. Murdock*.<sup>1</sup> That was a suit to enforce an alleged right to a flow of water. The plaintiff rested his title, first, on a deed, and, next, on a prescription, but at the hearing<sup>2</sup> he failed on both points. He then contended that the watercourse had been constructed by him at considerable expense, and that the defendant's ancestors had stood by and acquiesced, thus giving him a title to maintain his suit. Thereupon the Master of the Rolls gave him leave to amend, the defendant being at liberty to put in a further answer, both parties to bring forward fresh evidence, and the costs to be reserved. In *King v. Corke*<sup>3</sup> the plaintiff had charged the defendant with wilful neglect, but had not alleged any particular instance, and at the hearing he was allowed to amend the bill by specifying certain acts which had been disclosed by the answer, but the terms imposed upon him were, first, that the defendant should have leave to answer further, and, next, that he himself should not go into any new evidence, and should pay the costs of the day. In another case<sup>4</sup> a bill to set aside a settlement on the ground of fraud and surprise was allowed to be amended at the hearing, by setting up a case of infirmity of mind on the part of the settlor, but there also the defendant was permitted to put in a further answer and evidence. A defendant has also been allowed, after putting in with other defendants a joint statement of defence, to deliver a separate supplemental statement, he having been advised that an independent ground of defence was open to him.<sup>5</sup> Of course in this case he was

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upon them, rendered them nearly abortive. But now a totally different principle prevails. Every amendment is to be made, which is necessary for determining the real question in controversy between the parties."

<sup>1</sup> L. R., 1 Ch. D. 42, per Jessel, M. R.; 45 L. J., Ch. 213, S. C.

<sup>2</sup> Had this been a *trial by jury* the result might have been different. See post, § 240.

<sup>3</sup> L. R., 1 Ch. D. 57; 45 L. J., Ch. 190, S. C.; *Mozeley v. Cowie*, 47 L. J., Ch. 271, per Fry, J.

<sup>4</sup> *Roe v. Davies*, L. R., 2 Ch. D. 729.

<sup>5</sup> *Cargill v. Bower*, 46 L. J., Ch. 175.

ordered to indemnify the plaintiff against the costs rendered necessary by the amendment.

§ 229. In the case of *Tildesley v. Harper*<sup>1</sup> the facts were as follows. The statement of claim alleged that the defendant, in order to induce the plaintiff to grant a lease, had offered him a bonus, or, in other words, a bribe of £500, and had actually paid him £200. These allegations were specifically denied in the statement of defence, but the defendant did not go on to deny that *any* bribe had been offered or given. On these pleadings, the learned judge held at the trial that the giving of *some* bribe was admitted on the statement of defence; and—refusing the defendant's application to allow an amendment—gave judgment for the plaintiff. The defendant appealed; and the Lords Justices, apparently almost as a matter of course, decided that the judgment must be set aside, with liberty to defendant to amend his statement on payment of costs, the plaintiff being also at liberty to amend his pleadings, if necessary. Lord Justice Bramwell in this case, while discussing the circumstances under which the power of amendment should be exercised, very justly observed, that "leave to amend should always be given, unless the judge were satisfied that the party applying for it either had acted *malâ fide*, or had by his blunder caused some injury to his opponent, which could not be adequately compensated by the payment of costs or otherwise."<sup>2</sup> Again, it has been held by one of the Vice-Chancellors, that an action might, by amendment of the writ and statement of claim, be turned into an information and action without prejudice to a pending motion in the action, the sanction of the Attorney-General having first been obtained.<sup>3</sup> As all disputed questions of amendment depend upon the discretion of the judge, the Court of Appeal<sup>4</sup> will be very unwilling to interfere with that discretion, unless in a case where it is obvious that some serious mischief would result from non-interference.<sup>5</sup>

<sup>1</sup> 48 L. J., Ch. 495.

<sup>2</sup> *Id.* 496.

<sup>3</sup> *Caldwell v. Pagham Harbour Reclamation Co.*, L. R., 2 Ch. D. 221, per Hall, V.-C.

<sup>4</sup> See Rules of Sup. Ct., 1883, Ord. lviii., R. 4, cited post, § 1883.

<sup>5</sup> *Golding v. Wharton Salt Works Co.*, L. R., 1 Q. B. D. 374, per Ct. of App. (3108)

§ 230. As the decisions just cited by no means exhaust the subject, it will still be advisable, for the purpose of explaining the general nature of variance, and of marking the distinction between material and immaterial allegations, to refer to some of the cases decided under the earlier statutes.<sup>1</sup> And *first*, as to those cases in which an amendment has been allowed.

§ 231. In the case of *May v. Footner*,<sup>2</sup> the declaration stated § 182A that the defendant had entered certain land of the plaintiff. The real questions in dispute were, first, whether the land was the plaintiff's property; and, next, whether there was a public footway across it. At the trial, it turned out that the close in question was, at the time of the trespass, in the actual possession of a tenant of the plaintiff, whereupon the plaintiff was allowed by the judge to amend the declaration, so as to adapt it to an injury to his reversionary interest. The court subsequently held that this amendment had been properly made. In another case, where issue had been taken on an allegation that a certain cargo of goods was not delivered in March, it appeared at the trial that this was strictly true, but that it did not raise the real question, which was whether the cargo had been delivered in such time that the defendant was bound to accept it. Thereupon the judge, at the instance of the plaintiff, amended the declaration by inserting an averment that the plaintiff, at the defendant's request, had delayed the shipment, and that the defendant had promised to accept a delivery of that shipment within a reasonable time, and had exonerated the plaintiff from delivering in March. This amendment was also upheld by the court above.<sup>3</sup>

§ 232. In an action of slander, where the words charged in the declaration were, "S. is to be tried at the Old Bailey, &c." and § 184

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<sup>1</sup> Those who wish to understand the *very old* doctrine of variance, and to trace its oppressive operation previously to the passing of the remedial statutes, will find the subject fully and ably treated in 1 St. Ev. 430—494. See, also, 1 Ph. Ev. 503, et. seq.

<sup>2</sup> 25 L. J., Q. B. 32; 5 E. & B. 505, S. C.

<sup>3</sup> *Tennyson v. O'Brien*, 5 E. & B. 497. See *Savage v. Canning*, 1 R., 1 C. L. 434, per C. P.

those proved to have been really spoken were, "*I have heard that S. is to be tried, &c.*" the court held that the variance might be amended on payment of costs, though it was urged, that as the expression "*I have heard*" reduced the charge from a direct assertion to mere idle gossip, the defendant was prejudiced by the amendment, because, had these words been originally declared upon, he might have suffered judgment by default, or otherwise have pleaded a justification.<sup>1</sup> Mr. Justice Bosanquet observed, that the introduction of the words "*I have heard*" left the slander as actionable as before, although the amount of damages might be lessened;—that a variance, which is not material to the issue raised, but which may affect the quantum of damages, was not within the contemplation of the legislature when speaking of the "*merits of the case*;"—and that, as the damages were given for the words as *proved*, and as the defendant did not apply to amend his pleadings or to put off the trial, it did not appear how he could have been prejudiced in his defence.<sup>2</sup> This case, therefore, is important, as showing that an amendment should not be refused, simply because it may lessen the amount of damages, provided that it cannot affect the substantial line of defence. In another action of slander, where the words alleged to have been spoken of and concerning the plaintiff, as a surgeon, were, "*There have been many inquests held upon persons who have died, because he attended them*;" but those proved were, "*Several have died that he (the plaintiff) has attended, and inquests have been held on them*," the judge amended the record, and the court held that he was justified in so doing.<sup>3</sup> So, where the only variance was, that the words stated in the declaration were in the English language, while the expressions proved were Welsh, an amendment was allowed.<sup>4</sup>

§ 233. In another action of defamation, an amendment was held to have been properly made when, on objection being taken that the declaration contained the mere substance of the libel, a verbatim

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<sup>1</sup> *Smith v. Knowelden*, 2 M. & Gr. 561; 9 Dowl. 402; 2 Scott, N. R. 657, S. C.

<sup>2</sup> 2 M. & Gr. 565.

<sup>3</sup> *Southee v. Denny*, 1 Ex. R. 196.

<sup>4</sup> *Jenkins v. Phillips*, 9 C. & P. 766, per Coleridge, J.



copy of the defendant's letter was set out on the record.<sup>1</sup> So, where the declaration alleged that the defendant published a libel, "*contained in and being an article in a certain weekly paper, called the 'Paul Pry,'*" and it was proved that he gave a slip of printed paper, containing the libellous matter, to several persons to read; but it did not clearly appear that it had been cut from that newspaper, the record was amended without any terms being imposed on the plaintiff, by striking out the allegation marked in italics.<sup>2</sup> Again, when a plea of justification, in an action for a malicious prosecution on a charge of receiving stolen goods, alleged that the goods had been stolen by "some person unknown," the judge at the trial was held to have rightly allowed these three words to be struck out, and the name of the party who was proved to have taken the goods to be substituted in their place.<sup>3</sup>

§ 234. The case of *Whitwill v. Scheer*<sup>4</sup> is important as deciding § 186 that, where a declaration in assumpsit had stated a special contract, and had then contained an *erroneous* allegation in conformity with its *supposed legal effect*, such allegation might either be struck out, or so altered as to express correctly the real meaning of the contract.

§ 235. In several cases an amendment has been made, where § 187 the contract, or tort, or custom declared upon, has turned out to be either *more or less comprehensive* than the one proved.<sup>5</sup> Thus, the statement of a *general* warranty of a horse has been amended by substituting an allegation of a *qualified* warranty, where the defence did not depend upon the qualification introduced.<sup>6</sup> So, where the declaration alleged that the defendant promised to lay

<sup>1</sup> *Saunders v. Bates*, 1 H. & N. 402.

<sup>2</sup> *Foster v. Pointer*, 9 C. & P. 718, per Gurney, B. See also *Pater v. Baker*, 3 Com. B. 831.

<sup>3</sup> *Pratt v. Hanbury*, 14 Q. B. 190. See, also, *West v. Baxendale*, 9 Com. B. 141; and *Hailles v. Marks*, 30 L. J., Ex. 389; 7 H. & N. 56, S. C.

<sup>4</sup> 8 A. & E. 301; 3 N. & P. 391, S. C. But see *Bowers v. Nixon*, 2 C. & Kir. 372, cited post, § 239.

<sup>5</sup> See *Pacific St. Navig. Co. v. Lewis*, 16 M. & W. 783.

<sup>6</sup> *Hemming v. Parry*, 6 C. & P. 580, per Alderson, B., *Mash v. Densham*, 1 M. & Rob. 442, per id.; *Read v. Dunsmore*, 9 C. & P. 588.

out certain money in the purchase of a *government annuity*, and then averred as a breach, that he had not done so, but had placed it in the hands of some private company, an amendment was allowed by substituting the word "security" for "annuity," the evidence showing that the money had in fact been received for the purpose of investing it in some *government security*.<sup>1</sup>

§ 236. In other actions a like amendment has been allowed, 139 where a contract, a duty, an instrument, or other matter has been *misdescribed* on the record. Thus, in *Hanbury v. Ella*,<sup>2</sup> the declaration stated that the defendants, in consideration of the plaintiffs supplying beer to a third party, promised to *pay* them the amount of the beer so supplied, and in support of this statement a written *guarantee* was put in. This was a variance, since the declaration showed an *original* liability created, while the evidence merely proved a *collateral* one, but the court allowed an amendment to be made, by substituting the word "guarantee" for "pay," as the mistake could not under the circumstances have misled the defendants. So, the record has been amended, where the declaration alleged an undertaking by the defendants to carry and deliver certain goods, and the proof was that the undertaking was to forward them;<sup>3</sup>—where in an action by the indorsee against the drawer of a bill of exchange, the plaintiff alleged a presentment to the acceptor, but proved that the acceptor was dead, and that the bill had been presented to his executor;<sup>4</sup>—where the holder of a cheque, in suing the maker, alleged in his declaration that he had given due notice of dishonour, but merely proved at the trial that he had a valid excuse for giving no notice;<sup>5</sup>—where, to an action on a bill of exchange,

<sup>1</sup> *Gurford v. Bayley*, 3 M. & Gr. 781; 4 Scott, N. R. 398; 1 Dowl. N. S. 519, S. C. See, also, *Evans v. Fryer*, 10 A. & E. 609; 2 P. & D. 501, S. C.; *May of Carmarthen v. Lewis*, 6 C. & P. 608.

<sup>2</sup> 1 A. & E. 61; 3 N. & M. 438, S. C.

<sup>3</sup> *Parry v. Fairhurst*, 2 C. M. & R. 190; 5 Tyr. 685, S. C.

<sup>4</sup> *Caunt v. Thompson*, 7 Com. B. 400; 6 Dowl. & L. 621, S. C.

<sup>5</sup> *Jackson v. Carrington*, 2 C. & Kir. 750, per Parke, B. In this case the trial was postponed, and the plaintiff had to pay the cost of the day and of the amendment. Whether the variance without amendment would have been fatal, compare *Burgh v. Legge*, 5 M. & W. 418; *Cordery v. Colvin*, 14 Com. (3112);

the plea averred that the bill was accepted on an agreement that it should be in satisfaction of a large sum lost, in part at hazard, and in part at vingt-un, and no proof was given of money lost at vingt-un;<sup>1</sup>—where a guarantee was alleged in the declaration to have been given in consideration of advances to be made by A., and it appeared by the guarantee that the advances might be made by A., or by any member of his firm;<sup>2</sup>—where an agreement to grant a lease was stated in the pleadings to have been made between the defendant and the plaintiff, and it appeared at the trial that the real agreement was between the defendant and two other persons, devisees in trust under the will of one Miller of the first part, and the plaintiff of the other part, but that it had been executed by the plaintiff and defendant alone;<sup>3</sup>—where the contract, as alleged in the declaration, was that the defendant should build a room, booth, or building, and fit it up according to certain plans agreed upon, for the sum of 20*l.*, by the 28th of June, and that proved was, to erect certain seats and tables, to be completed four or five days before the 28th of June, for 25*l.*, and it did not appear that any plans had been prepared, but the defendant had pleaded non-assumpsit, and that the contract was rescinded by consent;<sup>4</sup>—where similar pleas had been pleaded to a declaration, which stated a contract by the defendant to deliver to the plaintiff certain potatoes within a reasonable time, to be paid for on delivery, and the evidence established a contract that the plaintiff should have the potatoes at digging-up time, and that he should find diggers;<sup>5</sup>—where, in an action on a bond, the penalty was stated in the declaration to be 280*l.*, and it

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B., N. S. 374; S. C., *nom.* *Cordery v. Colville*, 32 L. J., C. P. 210; *Killby v. Rochussen*, 18 Com. B., N. S. 357; and *Woods v. Dean*, 32 L. J., Q. B. 1.

<sup>1</sup> *Cooke v. Stratford*, 13 M. & W. 379; *Masters v. Barrets*, 2 C. & Kir. 715.

<sup>2</sup> *Chapman v. Sutton*, 2 Com. B. 634, 644; *Boyd v. Moyle*, *id.* 644; *Hassall v. Cole*, 18 L. J., Q. B. 257.

<sup>3</sup> *Boys v. Ansell*, 5 Bing. N. C. 390. The court in this case held it unnecessary to consider whether or not the variance was fatal, as it might clearly be amended. See *Gregory v. Duff*, 13 Q. B. 608.

<sup>4</sup> *Ward v. Pearson*, 5 M. & W. 16; 7 Dowl. 382, S. C. In this case the contract as proved differed from that alleged in the nature of the work to be done, in the time for doing it, and in the price; yet the court properly held that this was precisely the case which the Act of Parliament was meant to meet. See *Jones v. Hutchinson*, 10 Com. B. 515.

<sup>5</sup> *Sainsbury v. Matthews*, 4 M. & W. 343; 7 Dowl. 23, S. C.

appeared on the face of the instrument to be 200*l.*; <sup>1</sup>—where the plaintiff brought his action against a sheriff for an escape, and proved a negligent omission to arrest; <sup>2</sup>—where an instrument, declared on as a bill of exchange, appeared by the evidence to be a promissory note; <sup>3</sup> and where a note was set out in the declaration as made by the defendant, dated the 9th of November, 1838, and payable on demand, and the instrument proved at the trial was a joint and several note, made by the defendant and his wife, dated the 6th of November, 1837, and payable twelve months after date.<sup>4</sup> In this last case, the defendant had pleaded that he did not make the note, and the instrument produced differed from that declared upon, in its date, in the parties to it, and in its duration; but there being no proof of the existence of any other note between the parties, Mr. Baron Alderson expressed his opinion that “this was just the case in which the Legislature intended that the discretionary power of amendment should be exercised.”<sup>5</sup>

§ 237. Upon the trial of an issue of nul tiel record,—which, be it remembered, must be determined by the court, and not by a judge and jury,<sup>6</sup>—the court amended the declaration by inserting therein the true date of the judgment recovered.<sup>7</sup> In *Edwards v. Hodges*,<sup>8</sup> a plea of “Not guilty by statute” was amended by inserting in the margin an Act which had been omitted; and in *Buckland v. Johnson*,<sup>9</sup> a plea, not technically proved by the evidence, was amended at *Nisi Prius* so as to raise the substantial question, without the imposition of any costs. In *Knowlman v. Bluett*,<sup>10</sup> the judge at the trial went so far as to amend the declaration by increasing the demand from 600*l.* to 750*l.*, and the court above held

<sup>1</sup> *Hill v. Salt*, 2 C. & M. 420.

<sup>2</sup> *Guest v. Elwes*, 5 A. & E. 148; 2 N. & P. 230, S. C.

<sup>3</sup> *Moilliet v. Powell*, 6 C. & P. 233, per Alderson, B.; *Perry v. Fisher*, Sp. Ass. for Surrey, 1846, per Ld. Denman, MS.

<sup>4</sup> *Beckett v. Dutton*, 7 M. & W. 157; 8 Dowl. 865, S. C.

<sup>5</sup> *Beckett v. Dutton*, 7 M. & W. 158.

<sup>6</sup> *Richardson v. Willis*, 42 L. J., Ex. 15; 12 Cox, 298, S. C.

<sup>7</sup> *Noble v. Chapman*, 14 C. B. 400. See also *Hunter v. Emmanuel*, 15 Com. B. 290, where the true amount recovered was inserted in the declaration.

<sup>8</sup> 15 Com. B. 477.

<sup>9</sup> *Id.* 145.

<sup>10</sup> 43 L. J., Ex. 29; 9 Law Rep., Ex. 1, S. C. See *Watkins v. Morgan*, 6 C. & P. 661.

that he was quite justified in so doing. Again, where an action had been brought against the clerk of a local board of health, the court allowed the proceedings to be amended by substituting the board as defendants, instead of the clerk;<sup>1</sup> and a similar amendment has been sanctioned, where the board had sued in the name of their clerk in lieu of their own name.<sup>2</sup>

§ 238. The cases in which amendments have been *refused* under the old law will not detain us long, and the more so as they furnish no safe guide in interpreting the more liberal language of the new rules. Indeed, it is clear that very many of the decisions are no longer law. Not the least important case which has been determined on this point is that of *Wilkin v. Reed*.<sup>3</sup> There the declaration alleged, that the defendant had fraudulently represented to the plaintiff that the reason why he had dismissed a clerk, whom the plaintiff was about to take into his service, was the decrease in his business, and that the defendant had recommended the plaintiff to try the clerk, and had knowingly suppressed the fact that he had been dismissed on account of dishonesty. At the trial it appeared in evidence, that the plaintiff had asked the defendant the cause of the clerk's dismissal, and had been told in reply that it was in consequence of the defendant's business having fallen off; that this answer was true; but that the clerk had been guilty of embezzlement while in the defendant's employ, and that the defendant, having been asked no questions respecting the clerk's honesty, had not communicated that fact to the plaintiff. On this evidence the plaintiff's counsel applied to amend the declaration, by striking out the allegation, that the defendant had fraudulently misrepresented the reason of dismissal, and by substituting for it an averment, that the defendant had fraudulently suppressed the fact that the clerk had been guilty of dishonesty. Mr. Justice Maule, however, who tried the cause, refused to allow the amendment, on the ground that the real question in controversy was not whether the clerk had

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<sup>1</sup> *Ld. Bolinbroke v. Townsenu*, 8 Law Rep. C. P. 645.

<sup>2</sup> *Mills v. Scott*, 8 Law Rep., Q. B. 496; 42 L. J., Q. B. 234, S. C.

<sup>3</sup> 23 L. J., C. P. 193; 15 Com. B. 192, S. C. See, also, *Lucas v. Tarleton*, 27 L. J., Ex. 246.

been dishonest, or whether his former master had suppressed the fact of his dishonesty, but whether the real cause of his dismissal had been truly stated. The Court of Common Pleas afterwards supported this ruling, and held, first, that it is a matter, not of law, but of fact, what "the real question in controversy between the parties" is; next, that this matter of fact must be determined, not by the jury, but by the judge on a careful consideration of the pleadings and the evidence; and, lastly, that "the question in controversy" is, in other words, the question which both parties really intended to have tried, and not any question which, during the course of the trial, may for the first time be brought into controversy by one of the litigants.<sup>1</sup>

§ 239. Though the mere impropriety or harshness of an action ought to have no effect in influencing the decision of the judge,<sup>2</sup> the plaintiff has been refused an amendment where the matter sought to be expunged had been purposely and improperly introduced by him into the declaration, with the view of creating a prejudice against the defendant; as, for instance, where a count in libel contained several averments and innuendoes unfairly connecting the plaintiff with parts of the alleged libel, which, in fact, related to other persons.<sup>3</sup> Moreover, as the Rules for allowing amendments at *Nisi Prius* are intended to meet variances arising from mere slips or accidents, the judge will be very reluctant to allow an amendment, where the party has *intentionally* framed his pleading in such a manner as to give rise to the objection.<sup>4</sup> Neither will a judge amend the record, when it turns out at the trial that the plaintiff has misconceived his remedy, and when he consequently seeks to convert the proceedings into an action of a different character.<sup>5</sup>

<sup>1</sup> See *Roles v. Davis*, 4 H. & N. 184.

<sup>2</sup> *Doe v. Edwards*, 1 M. & Rob. 321, per Parke, B.; *Doe v. Leach*, 3 M. & Gr. 230. See *Brennan v. Howard*, 1 H. & N. 138.

<sup>3</sup> *Prudhomme v. Fraser*, 1 M. & Rob. 435, per Ld. Denman.

<sup>4</sup> *Bowers v. Nixon*, 2 C. & K. 372, per Maule, J.; *Clowes v. Hillard*, L. R., 4 Ch. D. 415, per Jessel, M. R. But see *Whitwill v. Scheer*, 8 A. & E. 301; 3 N. & P. 391, S. C., cited ante, § 234.

<sup>5</sup> *Jacobs v. Seward*, 5 Law Rep., H. L. 464.

§ 240. The court has also refused to amend at *Nisi Prius*, where it appeared likely that the variance had prevented the defendant from pleading a good bar to the action,<sup>1</sup> or where the amendment proposed would in all probability have caused the defendant either to demur,<sup>2</sup> or to plead different pleas from those on the record,<sup>3</sup> or would have introduced an entirely new contract and new breach,<sup>4</sup> or, perhaps even, any entirely new matter.<sup>5</sup> Thus, in an action of covenant by the assignee of the reversion against the lessee, the declaration, in deducing title to the plaintiff, set out a deed, whereby the premises were appointed to him. The defendant traversed the appointment, and the deed, on its production, was found to be nugatory as an appointment, not being executed in pursuance of the power. The plaintiff thereupon sought to amend his declaration by setting out the deed at length, and by averring that a relationship existed between the parties, so as to raise a covenant to stand seized to uses; but the court considered that the case was much too complicated for an amendment to be made at *Nisi Prius*. If the declaration had thereby been rendered good, the defendant might have put on the record different pleas from those before pleaded; but if not, then she might have demurred.<sup>6</sup> So, in an action on the case for diverting a stream of water, to which the plaintiff claimed a right as the possessor of a mill, when, in fact, he was entitled to it as the owner of the adjoining lands, the court considered that the declaration ought not to be amended, as the defendant had traversed the plaintiff's right in respect of the mill, and might have pleaded differently had the declaration claimed the right in respect to the land.<sup>7</sup>

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<sup>1</sup> *Ivey v. Young*, 1 M. & Rob. 545, per Alderson, B.

<sup>2</sup> *Evans v. Powis*, 1 Ex. R. 601; *Bury v. Blogg*, 12 Q. B. 877; *Martyn v. Williams*, 26 L. J., Ex. 117; 1 H. & N. 817, S. C.

<sup>3</sup> *Perry v. Watts*, 3 M. & Gr. 775, explained in *Gurford v. Bayley*, id. 784, 785; *Frankum v. Ld. Falmouth* 6 C. & P. 529; 2 A. & E. 452, S. C.

<sup>4</sup> *Brashier v. Jackson*, 6 M. & W. 549; 8 Dowl. 784, S. C.; *Boucher v. Murray*, 6 Q. B. 362; *Richards v. Bluck*, 6 Dowl. & L. 325; 6 Com. B. 437, S. C.; *Moncrieff v. Reade*, 2 C. & Kir. 705.

<sup>5</sup> *David v. Preece*, 5 Q. B. 440. See *Gull v. Lindsay*, 4 Ex. R. 45; and *Addington v. Magan*, 10 Com. B. 576.

<sup>6</sup> *Perry v. Watts*, 3 M. & Gr. 775, explained by Maule, J., in *Gurford v. Bayley*, id. 784, 785.

<sup>7</sup> *Frankum v. Ld. Falmouth*, 6 C. & P. 529; 2 A. & E. 452; 4 N. & M. 330, S. C.

§ 241. Independent of actual decisions little doubt can be now § 182 entertained that the judge may allow a *plea to be added* at the trial, whenever it is necessary for the purpose of placing on the record the real question in dispute.<sup>1</sup> It often happens, as was once observed by Mr. Justice Maule, that in consequence either of imperfect instructions given to the pleader, or of ignorance, or of oversight, the substantial point intended by the parties to be tried is not raised by the pleadings;<sup>2</sup> and when this occurs it would be obviously unjust to refuse an amendment. It would seem, however, not to be *imperative* on the court to allow a plea to be substituted after issue joined, even though the application be made prior to the trial, and though it be supported by an affidavit that the real question in controversy between the parties can only be raised on the record by the introduction of the proposed plea.<sup>3</sup> The case in which this point was ruled was an action for money lent, to which the defendant had pleaded that he was "never indebted." After issue joined he applied to the court for leave to substitute a plea, which set up as a defence that the loan was contracted for an illegal purpose, and he swore that the real point in dispute was whether the plaintiff was debarred from recovering on the ground of the illegality. In support of the motion the defendant contended that he was entitled as of right to the rule as prayed, for the Act then in force<sup>4</sup> expressly stated that all amendments necessary for determining the real question in controversy "*shall be so made.*" Notwithstanding this argument the rule was refused.

§ 242. It remains to notice a few *practical* points which have been § 197 decided respecting the operation of the earlier Statutes. And, first, it has been held that an amendment at *Nisi Prius* must be made, if at all, during the trial and before the verdict;<sup>5</sup> unless, indeed, the opposite party waives his right to enforce this amount of strictness, in which case it will suffice if the amendment be made within the time allowed for moving, provided it ultimately agrees with the judge's

<sup>1</sup> Mitchell v. Crassweller, 13 Com. B. 237.

<sup>2</sup> Wilkin v. Reed, 23 L. J., C. P. 195, 197; 15 Com. B. 205, S. C.

<sup>3</sup> Ritchie v. Van Gelder, 9 Ex. R. 762.

<sup>4</sup> 15 & 16 V., c. 76, § 222.

<sup>5</sup> Brashier v. Jackson, 6 M. & W. 549; 8 Dowl. 784, S. C.; Doe v. Long, 9 C. & P. 777, per Coleridge, J.



note ;<sup>1</sup> secondly, it must be allowed by the presiding judge, who, it seems, may be the sheriff or his officer;<sup>2</sup> thirdly, when, in consequence of an amendment being allowed in a declaration, some alteration becomes necessary in the plea, the court will direct this also to be made, should the counsel for the defendant decline to interfere or to amend the pleadings himself ;<sup>3</sup> and, fourthly, the court will not control the discretion of the judge either in refusing<sup>4</sup> or allowing<sup>5</sup> an amendment to be made, unless upon clear proof that he was wrong, or, at least, unless it be shown, by affidavit, that the defendant has been prejudiced by the amendment. In all these cases, if both parties consent, a larger power may be exercised, either by the judge at Nisi Prius, by the person substituted in his stead, or by the court above.<sup>6</sup>

§ 243. With respect to *costs*, it is difficult to lay down any distinct rule, as each case must, in a great degree, depend upon its own particular circumstances ; still it may be advanced as a safe proposition, that the court will not allow any additional expense to be thrown upon the opposite party by reason of any amendment.<sup>7</sup> Thus, if the defendant has put pleas on the record, the proof of which will be rendered unnecessary by the alteration proposed, or has summoned witnesses, whom it will become needless to call, or has otherwise been at any bonâ fide expense in preparing to disprove the original allegations, the plaintiff will be permitted to amend on payment of the costs occasioned by his error ; and if it appear probable that the defendant, in consequence of the amendment, will require to alter his pleas, or to summon other witnesses, the trial will at least be postponed, and the plaintiff be obliged to

<sup>1</sup> Jones v. Hutchinson, 10 Com. B. 515.

<sup>2</sup> Hill v. Salt, 2 C. & M. 420 ; 4 Tyr. 271, S. C. See 30 & 31 V., c. 142, § 6.

<sup>3</sup> Perry v. Fisher, Sp. Ass. Surrey, 1846, per Ld. Denman, MS.

<sup>4</sup> Doe v. Errington, 1 A. & E. 750 ; 3 N. & M. 646 ; 1 M. & Rob. 344, n., S. C. ; Jenkins v. Phillips, 9 C. & P. 768, per Coleridge, J. ; Whitwill v. Scheer, 8 A. & E. 309, per Patteson, J. ; Holden v. Ballantyne, 29 L. J., Q. B. 148. See Lucas v. Beale, 10 Com. B. 739 ; Brennan v. Howard, 1 H. & N. 138 ; 25 L. J., Ex. 290, S. C.

<sup>5</sup> Sainsbury v. Matthews, 4 M. & W. 347, per Ld. Abinger.

<sup>6</sup> Parry v. Fairhurst, 2 C. M. & R. 190 ; 5 Tyr. 685, S. C., noticed by Patteson, J., in Guest v. Elwes, 5 A. & E. 126 ; Roberts v. Snell, 1 M. & Gr. 577 ; Brashier v. Jackson, 6 M. & W. 558.

<sup>7</sup> Smith v. Brandram, 2 M. & Gr. 250, per Tindal, C. J.

pay the costs of the postponement. In cases where the variance cannot have misled the opposite party, the amendment will be allowed without the payment of any costs.<sup>1</sup>

§ 244. Although the judge at Nisi Prius has a discretionary power of awarding or refusing costs in the event of an amendment, the court will take care that no injustice is done by his accidentally omitting to give directions on the subject; and, therefore, when an order has been obtained by the plaintiff, enabling him to withdraw the record and amend the declaration, but no mention was made respecting the costs; the court held that, as the variance had been corrected for the benefit of the plaintiff, he was bound to liquidate the defendant's costs of the day.<sup>2</sup>

§ 245. It has already been stated<sup>3</sup> that the Rules respecting Amendments, as set out in § 225,—unlike many of the Rules of 1883,—“apply to all civil proceedings on the Crown side of the Queen's Bench Division, including mandamus and prohibition, and also to quo warranto, and to all proceedings on the Revenue side of the said Division.”<sup>4</sup> They further apply to the High Court exercising jurisdiction in Bankruptcy, which now forms part of the Supreme Court,<sup>5</sup> and to such of the County Courts as have bankruptcy jurisdiction.<sup>6</sup> They are also applicable to Admiralty actions, and to Probate actions; but they do not affect the procedure or practice, either in criminal proceedings, or in proceedings for Divorce or other Matrimonial Causes.<sup>7</sup> In the Divorce Court the only material rule respecting the amendment of pleadings was promulgated in 1875, and is thus expressed:—“Either of the parties before the court desiring to alter or amend a pleading may apply by summons to one of the registrars for an order for that purpose.”<sup>8</sup>

§ 246. Large powers of amendment are granted to the County

<sup>1</sup> St. Losky v. Green, 30 L. J., C. P. 19; 9 Com. B., N. S. 370, S. C.

<sup>2</sup> Skinner v. Lond. & Brigh. Ry. Co., 1 L. M. & P. 189; 4 Ex. R. 885, S. C.

<sup>3</sup> Ante, § 221A.

<sup>4</sup> Ord. lxviii. R. 2.

<sup>5</sup> 46 & 47 V., c. 52, § 93.

<sup>6</sup> 46 & 47 V., c. 52, § 100.

<sup>7</sup> Ord. lxviii. R. 1.

<sup>8</sup> Rules in Div. & Mat. Causes, R. 187. See also RR. 35—37.

Courts, when errors have been committed with respect to the names, descriptions, numbers, or representative characters of the plaintiffs and defendants;<sup>1</sup> and, in addition to these powers, it is provided by § 57 of the Act of 19 & 20 V., c. 108, that "the judge of a County Court may at all times amend all defects and errors in any proceeding in such court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for." Still, if the particulars of the plaintiff's claim do not disclose a case within the jurisdiction of County Court, the judge has no power to amend them, so as to turn the complaint into one over which he has cognisance.<sup>2</sup>

§ 247. The Civil Bill Courts in Ireland are intrusted with § 201 similar powers of making amendments by the Act of 14 & 15 V., c. 57, which in § 106 enacts, that "it shall and may be lawful for the several assistant barristers, and judges on appeal, and they are hereby respectively empowered, in all cases, to amend all variances between the statement of the cause of action in any civil bill, or other process or proceeding in their respective civil bill courts, and the evidence in support of such cause of action, and also to amend all variances, omissions, and misdescriptions in the descriptions, additions, and residence of the parties, or any of them, or otherwise howsoever, of or in any such process, or between the original and any copy or copies thereof, provided such last-mentioned variances, omissions, or misdescriptions shall not, in the opinion of the assistant barrister, be calculated to mislead the defendant or defendants therein; and in every case of any misjoinder of parties or causes of action, it shall and may be lawful for every assistant barrister to strike out of the process the name or names of any one

<sup>1</sup> See Cy. Ct. Rules, 1875, 1876, Ord. xvii., r. 21. See *Mills v. Scott*, 8 Law Rep., Q. B. 496, cited ante, § 237.

<sup>2</sup> *Hopper v. Warburton*, 32 L. J., Q. B. 104, per Mellor, J., in B. Ct. (3121)

or more plaintiffs or defendants, or any count or counts in such process, by reason of whom or which such misjoinder shall arise, and thereupon to proceed therein as to justice shall appertain."<sup>1</sup>

§ 248. The only statute which, prior to the year 1848, authorised § 202 the amendment of any variances in criminal cases was 9 G. 4, c. 15;<sup>2</sup> and that Act, which was confined to variances appearing between any matter in writing or in print produced in evidence, and the recital thereof upon the record,<sup>3</sup> merely applied to *misdemeanors*, and then only to cases where the indictment or information was preferred before a court of *oyer and terminer and general gaol delivery*.<sup>4</sup> In 1848, however, more liberal views being entertained by the Legislature, the provisions of that Act were extended to *all offences whatever*;<sup>5</sup> and, in the following year, similar powers

<sup>1</sup> Further powers of amendment are given to the Civil Bill Cts., and to the "judge of assize on appeal," by 27 & 28 V., c. 99, § 48, Ir.

<sup>2</sup> See ante, § 220.

<sup>3</sup> See *R. v. Cooke*, 7 C. & P. 559; *R. v. Hewins*, 9 C. & P. 786; *R. v. Christian*, C. & Marsh. 388.

<sup>4</sup> This Act,—after reciting that "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now, in any case, be amended at the trial, and in some cases cannot be amended at any time:"—for remedy thereof, enacts, that "it shall be lawful for every court of oyer and terminer, and general gaol delivery in England, Wales, Berwick-upon-Tweed, and Ireland, if such court shall see fit so to do, to cause the record on which any trial may be pending before any such court in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any), to the other party, as such court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared; and thereupon the papers, rolls, and other records of the court shall be amended accordingly."

<sup>5</sup> 11 & 12 V., c. 46, § 4, which,—following the language of the Act of G. 4, as cited in last note,—enacts, "that it shall and may be lawful for any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court; and after such amend-

of amendment were conferred on all courts of *general or quarter sessions* in England.<sup>1</sup> These alterations in the law were no doubt steps in the right direction, but still they were found to afford a very ineffectual remedy for the evil complained of; and consequently, in 1851, the interposition of Parliament was again invoked by Lord Campbell, and an Act was at length passed,<sup>2</sup> which has placed criminal proceedings<sup>3</sup> on nearly the same footing with civil actions, in respect to the amendment of variances between the record and the proof.

§ 249. After reciting that "a failure of justice often takes place § 203 on the trial of persons charged with felony and misdemeanor, by reason of variances between the statement in the indictment on which the trial is had, and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the mis-statement whereof the person on trial cannot have been prejudiced in his defence;"—the statute proceeds to enact, in § 1, that "whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment,—or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of

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ment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared."

<sup>1</sup> 12 & 13 V., c. 45, § 10. Cts. of Quart. Sess. in Irel. have large powers of amendment by 27 & 28 V., c. 99, Ir.

<sup>2</sup> 14 & 15 V., c. 100.

<sup>3</sup> The Inferior Courts in *Scotland* have now, under "The Summary Procedure Act, 1864," 27 & 28 V., c. 53, § 5, large powers of amending complaints before them with respect to variances and other defects.

any person or persons whomsoever therein named or described,—or in the *name or description of any matter or thing whatsoever herein named or described*,—or in the ownership of any property named or described therein,—it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance *not material to the merits of the case*, and that the defendant *cannot be prejudiced thereby in his defence on such merits*, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued, as it may be necessary to amend, shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court.”

§ 250. The Act then contains a proviso, “that, in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognisances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognisances for that purpose, in such and the same manner as if they were originally bound by their recognisances to appear and prosecute or give evidence at the time and place to

with such trial shall have been so postponed ;” and a further proviso directs, “that, where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same challenges, as they were respectively entitled to before the first jury was sworn.”

§ 251. The second section enacts, *ex majori cautela*, that “every § 205 verdict and judgment, which shall be given after the making of any amendment under the provisions of this Act, shall be of the same force and effect in all respects, as if the indictment had originally been in the same form in which it was after such amendment was made;” while § 3 provides, that, “if it shall become necessary at any time for any purpose whatsoever to draw up a formal record, in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.”<sup>1</sup>

§ 252. Under these salutary provisions it has been held, that an § 206 indictment charging the defendant with having obstructed a footway may be amended, when one of the termini of the way has been misdescribed, provided the variance be not calculated to prejudice the defence;<sup>2</sup>—that an amendment may be made when the ownership of stolen property,<sup>3</sup> or the stolen property itself,<sup>4</sup> is wrongly described;—that the misnomer of a party injured may be rectified;<sup>5</sup>—that the misdescription of any persons described in the indictment may be set right;<sup>6</sup>—that an erroneous date ascribed to the passing of a statute may be struck out;<sup>7</sup>—that where an indictment for perjury alleged that the crime was committed on a trial for burning a barn, and it was proved that the actual charge was one of firing a

<sup>1</sup> See further as to the amendment of formal defects in indictment, § 25 of the Act, cited post, § 280, n. <sup>1</sup>.

<sup>2</sup> *R. v. Sturge*, 3 E. & B. 734.

<sup>3</sup> *R. v. Vincent*, 2 Den. 464; *R. v. Fullarton*, 6 Cox, 194.

<sup>4</sup> *R. v. Gumble*, 42 L. J., M. C. 7; 2 Law Rep., C. C. 1; 12 Cox, 248, S. C.

<sup>5</sup> *R. v. Welton*, 9 Cox, 297.

<sup>6</sup> *R. v. Western*, 37 L. J., M. C. 81; 1 Law Rep., C. C. 122; 11 Cox, 93, S. C.

<sup>7</sup> *R. v. Westley*, Bell, C. C. 193.

*stack*, the court had power to amend the variance;<sup>1</sup>—and that it is not too late to apply for an amendment, even though the counsel for the prisoner may have addressed the jury.<sup>2</sup> This last case is important, as it overrules a mischievous decision by Williams, J., to the effect that an application to amend must at latest be made before the case for the prosecution is closed.<sup>3</sup> It seems that, in general, the court will not amend an indictment after plea, if, in its amended form, it would be open to a demurrer.<sup>4</sup> Neither can an amendment be made after verdict.<sup>5</sup> Nor will the court amend an amendment, or restore an indictment, once amended, to its original form.<sup>6</sup> Where a prisoner was indicted for a statutable forgery, but the evidence only sustained a forgery at common law, Mr. Justice Hill declined to amend the indictment by striking out the word “feloniously,” and thus converting a charge of felony into one of misdemeanor.<sup>7</sup>

§ 253. Although Lord Campbell’s Act has now been in operation for thirty-three years, the decisions under it scarcely justify the expression of any confident opinion as to the amount of liberality with which its language will eventually be construed by the courts. The narrow rules of interpretation, which have been promulgated by one or two of the judges with reference to the prior statute, 9 G. 4, c. 15,<sup>8</sup> are calculated to excite a reasonable fear lest an equally strict construction should be applied to the amendment clauses of this act; but, on the other hand, it cannot be denied that the subject is now far better understood than it formerly was, and that *even* judges are beginning to discover that

<sup>1</sup> *R. v. Neville*, 6 Cox, 69, per Williams, J.; *R. v. Tymms*, 11 Cox, 645, per Lush, J.

<sup>2</sup> *R. v. Fullarton*, 6 Cox, 194, per Lefroy, C. J., and Monahan, C. J.

<sup>3</sup> *R. v. Rymes*, 3 C. & Kir. 326.

<sup>4</sup> *R. v. Lallement*, 6 Cox, 204. *Sed qu.* The case, as reported, is not satisfactory.

<sup>5</sup> *R. v. Larkin*, 6 Cox, 377; *R. v. Frost*, Pearce & D. 474; 24 L. J., M. C. 116, S. C.

<sup>6</sup> *R. v. Barnes*, 1 Law Rep., C. C. 45; 35 L. J., M. C. 204; *R. v. Pritchard*, 30 L. J., M. C. 169; L. & Cave, 34, S. C.; *R. v. Webster*, L. & Cave, 77.

<sup>7</sup> *R. v. Wright*, 2 Fost. & Fin. 320.

<sup>8</sup> *R. v. Cooke*, 7 C. & P. 556, per Patteson, J.; *R. v. Hewins*, 9 C. & P. 786, per Coleridge, J.



substantial justice is of more real importance than mere technical precision. Wise men should ever bear in mind, that the object of the Acts which authorise amendments in criminal proceedings, is to render punishment more certain, by neutralising the effect of trivial variances, which have constantly protected the wrong doer. So long as the least rational doubt exists respecting the guilt of a prisoner, it is only fair that the ample shield of justice should screen him from injury ; that juries should weigh with jealousy the evidence against him ; and that judges should see most clearly that the act, with which he is charged, is an offence against the law. But when courts of justice go further than this, and permit the law to be defeated by technical errors, which cannot by possibility mislead a defendant, and which have nothing to do with the substantial merits of the case, they take the most effectual means of rendering the administration of the criminal law a fitting subject for contempt and ridicule. In civil causes, the Rules authorising amendments receive a liberal construction, and properly so.<sup>1</sup> Why, then, should an absurdly strict construction be applied in criminal courts ? The statutes themselves warrant no such distinction, and to introduce into the interpretation of them the old doctrine "*strictissimi juris*," is to misunderstand and misapply the meaning of that doctrine, and to make the commandments of the Legislature of none effect through your traditions.

§ 254. Having now drawn attention to the Rules and the Acts § 208 which authorise amendments to be made, whether in civil or criminal proceedings, and having also examined the leading cases that have been decided under them, it will be expedient briefly to notice some general rules which regulate the law of *variance*; because, although a discrepancy between the allegation and the proof is not, as formerly, fatal, provided that it be not material to the

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<sup>1</sup> The language of *Ld. Mansfield in Bristow v. Wright*, 2 Doug. 666, should never be forgotten. "I am very free to own," said his Lordship, "that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession ; because it is *extremely hard on the party to be turned round, and put to expense, from such mistakes of the counsel or attorney he employs. It is hard, also, on the profession.*"

substantial merits, yet it may still entail considerable expense on the party, who is driven to apply for an amendment. It is therefore important to ascertain, upon what occasions the opposite party is entitled to object, that the substance of the issue has not been proved.

§ 255.<sup>1</sup> The first rule in connexion with this subject is, that *surplusage need not be proved*, and the proof, if offered, should be rejected. The term surplusage comprehends whatever may be stricken from the record without destroying the right of action, or the charge, on the one hand, or the defence on the other. This, it is true, is a loose, and therefore an unsatisfactory, definition; but it is difficult, not to say impossible, to find one more distinct and practical. Each case must, in a great measure, depend on its own particular circumstances, and the best means of ascertaining what will, or will not, amount to surplusage, is by examining the decisions on this subject. The case of *Williamson v. Allison*,<sup>2</sup> is a leading authority. That was a declaration in tort, for breach of a warranty that some claret was in a fit state to be exported to India, whereas it was at the time, and *the defendant well knew* that it was, in a very unfit state. At the trial no evidence was given of the defendant's knowledge, and the verdict being for the plaintiff, a motion was made for a new trial, on the ground that the scienter, having been alleged, ought to have been proved; but the court were unanimously of opinion that the allegation of the scienter was wholly unnecessary and immaterial, and therefore required no proof. The grounds for this decision are explained with great clearness by Lord Ellenborough in pronouncing his judgment. "If," said his Lordship, "the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For, if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it,

<sup>1</sup> Gr. Ev., § 51, in part.

<sup>2</sup> 2 East, 446; cited by Ld. Abinger in *Cornfoot v. Fowke*, 6 M. & W. 377.

it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit." Mr. Justice Lawrence added, "I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, although the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover."<sup>1</sup>

§ 256.<sup>2</sup> So, in an action for removing earth from the defendant's land, whereby the foundation of the plaintiff's house was injured, the allegation of bad intent in the defendant need not be proved, for the cause of action is perfect, independent of the intention.<sup>3</sup> So, in an action for impounding cattle in an unfit pound, an averment that the pound was "at all times unfit, as the defendant well knew," may be rejected as immaterial, and consequently it requires no proof.<sup>4</sup> Again, if a declaration discloses a state of facts upon which an action may be maintained, although the defendant has not been guilty of malice or fraud, the plaintiff is not bound to prove either, notwithstanding both be alleged, and he may recover upon the liability which the facts disclose, though both fraud and malice be actually disproved.<sup>5</sup> In an action, too, against a common carrier for the loss of property intrusted to him, negligence, though averred, need not be proved.<sup>6</sup> So, also, in trespass, for driving against the plaintiff's cart, an averment that he was in the cart is immaterial.<sup>7</sup> § 210

<sup>1</sup> 2 East, 451, 452. See, also, *Jackson v. Allaway*, 6 M. & Gr. 942; 7 Scott, N. R. 875, S. C.; *Att.-Gen. v. Clerc*, 12 M. & W. 640; *Tempest v. Kilner*, 2 Com. B. 300; *Anderson v. Thornton*, 8 Ex. R. 425; *Thom. v. Bigland*, id. 725; *Southall v. Rigg*, and *Forman v. Wright*, 11 Com. B. 481.

<sup>2</sup> Gr. Ev., § 64, as to the first four lines.

<sup>3</sup> *Panton v. Holland*, 17 Johns. 92; *Twiss v. Baldwin*, 9 Conn. 291.

<sup>4</sup> *Bignell v. Clarke*, 5 H. & N. 485.

<sup>5</sup> *Swinfen v. Lord Chelmsford*, 5 H. & N. 890, 920, 921.

<sup>6</sup> *Richards v. Lond. & South Coast Ry. Co.*, 7 Com. B. 839. See ante, § 187.

<sup>7</sup> *Howard v. Peete*, 2 Chit. R. 315.

In like manner, where a declaration,—after alleging that the plaintiff was possessed of a pond, and the defendant was possessed of an adjoining close, *used as a private road*,—averred that the defendant wrongfully cut in his close, *used as a private road*, a certain large sewer, and thereby diverted the water from the pond, the court held that the words marked in italics were clearly immaterial, and that the plaintiff might recover damages, though it appeared that the sewer was cut previously to the construction of the road. “What,” said Chief Justice Tindal, “has it to do with the wrongful act of the defendant, or the measure of damages which the plaintiff is entitled to claim, whether the defendant used his close as a road, an orchard, or a garden?”<sup>1</sup>

§ 258. In an action, too, by a servant against his masters for { 211 the breach of a contract of hiring, where the declaration charged the defendants with having wrongfully and without reasonable or probable cause dismissed the plaintiff, and the plea alleged that they did not *wrongfully and without reasonable or probable cause* dismiss him, the court held that the fact of the dismissal was alone put in issue.<sup>2</sup> So, where a defendant, while traversing in terms the plaintiff’s declaration, had averred in his plea that he did not *wrongfully* maintain a weir at an improper height, he was not allowed to prove that such maintenance was rightful, for that would have been tantamount to giving matter of confession and avoidance in evidence under a simple traverse.<sup>3</sup> So, where a girl of ten years old, by her *procchein ami*, sued a surgeon in case, and the declaration stated that she had employed him to cure her, and then claimed damages for misfeasance, the court held that there was no material variance between the allegation and the proof, though the defendant

<sup>1</sup> *Dukes v. Gostling*, 1 Bing. N. C. 588, 593.

<sup>2</sup> *Powell v. Bradbury*, 7 Com. B. 201. See, however, *Lush v. Russell*, 1 L. M. & P. 369, 374, 375; 5 Ex. R. 203, 209, 210, S. C., where this case is denied to be law, and it is laid down that “if a traverse, instead of being in a general form, puts in issue an immaterial part in *express terms*, that must be disposed of by the jury, and, generally speaking, according to the terms of the issue.” See *Smith v. Lovell*, 10 Com. B. 6, 23, 24; and *Horton v. M’Murtry*, 29 L. J., Ex. 265; 5 H. & N. 867, S. C.

<sup>3</sup> *Keller v. Blood*, 13 Ir. Law R., N. S. 19, per Ex. Ch., affirming S. C. reported 11 Ir. Law R., N. S. 132.

had traversed the statement that the plaintiff had employed him, and it appeared that he had, in reality, been sent for by the mother, and paid by the father, of the child; for either the fact of the girl having allowed him to operate was evidence that she had employed him, and that he had accepted the employment, or,—the substance of the issue being, that he was employed to *cure* his patient,—it was immaterial *by whom* he was employed, and the statement that he was employed by the plaintiff might be struck out of the pleadings.<sup>1</sup>

§ 259. Again, if a bill be accepted payable at a particular place, § 212 without stating it to be payable there only, it is no variance, in an action against the acceptor, to declare upon it as payable at that place, though such an acceptance is declared by the Legislature to be, for all intents and purposes, a general acceptance;<sup>2</sup> for a general acceptance, being an engagement to pay anywhere, must include, amongst others, the particular place mentioned in the declaration; and it does not lie in the defendant's mouth to say that the bill was not payable at that place, when he has himself referred the parties there for payment.<sup>3</sup> So, in an action on a promissory note, where the declaration stated that the defendant made it, "his own proper hand being thereunto subscribed," but it appeared that the note was, in fact, drawn by his son, with his authority; Lord Tenterden held that this was no variance, as the allegation respecting the defendant's handwriting might be rejected as surplusage.<sup>4</sup> So, also, in action by an indorsee against the drawer or indorser of a

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<sup>1</sup> Gladwell v. Steggall, 5 Bing. N. C. 733; 8 Scott, 60, S. C.

<sup>2</sup> 45 & 46 V., c. 61, § 19.

<sup>3</sup> Blake v. Beaumont, 4 M. & Gr. 7, 10. It will be seen that this case depends rather on the doctrine of estoppel, than on that of variance.

<sup>4</sup> Booth v. Grove, M. & M. 182; 3 C. & P. 335, S. C. This case is probably correct law, though, on one occasion, where the declaration contained similar words, with respect to an indorsement which turned out to have been made by procuration, *Ld. Ellenborough* directed a nonsuit, *Levy v. Wilson*, 5 Esp. 179. In *Helmsley v. Loader*, 2 Camp. 450, the same learned judge, however, under precisely similar circumstances, would not allow the defendant to raise the objection, he having promised to pay, with a knowledge of all the facts; and his lordship was inclined to think that, even independently of the promise, it was enough to show that the defendant's name was written by an authorised agent. *Levy v. Wilson* may therefore be considered as overruled.

bill for default of payment, an allegation of acceptance need not be proved,<sup>1</sup> except in the case of a bill payable after sight. So, where the holder of a bill averred, as an excuse for not giving notice of dishonour to the drawer, that the latter had no funds in the acceptor's hands, and had sustained no damage from want of notice, this last negative averment was held to be immaterial, though the defendant had pleaded that he had sustained damage, because the acceptor had promised him to provide for the bill.<sup>2</sup>

§ 260. In an action on a promissory note brought by the indorsee against the maker, the defendant pleaded that he delivered the note to the indorser to enable him to take up a former accommodation note, and that after the note declared on became due, he paid the amount to the plaintiff. On a replication *de injuria* to this plea, the court held that the averment introductory to the payment of the last-mentioned note might be rejected as surplusage, and need not be proved. It amounted, in fact, to a mere unnecessary statement of the motive which induced the defendant to give the note. Mr Justice Coleridge observed: "The distinction is between an averment, the whole of which can be got rid of without injury to the plea, and an averment of circumstances essential to the defence, which are stated with needless particularity. In the latter case the whole averment must be proved as pleaded. In the former case, in civil or criminal proceedings, the whole may be considered as struck out, and therefore need not be proved."<sup>3</sup>

§ 261. The distinction here pointed out may be well illustrated by the case of *Bristow v. Wright*.<sup>4</sup> That was an action on the case against a sheriff, for taking the tenant's goods in execution without satisfying the landlord for a year's rent; and the plaintiff averred

<sup>1</sup> *Tanner v. Beau*, 4 B. & C. 312; 6 D. & R. 338, S. C.; overruling *Jones v. Morgan*, 2 Camp. 474.

<sup>2</sup> *Fitzgerald v. Williams*, 6 Bing. N. C. 68.

<sup>3</sup> *Shearm v. Burnard*, 10 A. & E. 593, 596; 2 P. & D. 565, S. C. See, also, *Noden v. Johnson*, 16 Q. B. 218, 226, 227, per Patteson, J.

<sup>4</sup> 2 Doug. 665; 1 Smith, L. C. 570, S. C.; explained and confirmed by Buller, J., in *Peppin v. Solomons*, 5 T. R. 497, 498; and by Ld. Ellenborough in *Williamson v. Allison*, 2 East, 450. See, also, *Savage v. Smith*, 2 W. Bl. 1101; *Hoar v. Mill*, 4 M. & Sel. 470.

that the rent was reserved *quarterly*, whereas it turned out to be reserved *yearly*. There, had the whole averment as to the reservation of the rent been struck out, the plaintiff could not have maintained his action, because some rent must necessarily have been averred to be due; and therefore, though the plaintiff need not have stated in which manner the rent was reserved, yet, as he had chosen to do so, the defendant was held entitled to avail himself of the defect of proof in that particular. So, if in justifying the taking of cattle damage feasant, in which case it is sufficient to allege that they were doing damage in the defendant's *freehold*, he should needlessly state a seisin *in fee*, which is traversed, the precise estate which he has set forth becomes an essentially descriptive allegation, and must be proved as alleged.<sup>1</sup>

§ 262. Upon the same ground it was held, prior to the Act of § 213 14 & 15 V., c. 100, that if a person were indicted for stealing a live fowl he could not be convicted upon evidence showing that he had stolen a dead one;<sup>2</sup> and the allegation of the colour of an animal, though wholly unnecessary, was, as a matter of description, obliged to be proved as laid.<sup>3</sup> So, where an indictment for bigamy described the second wife as a widow, when in fact she had never been married, the misdescription was held fatal, though it was unnecessary to have stated more than her name;<sup>4</sup> and where a crime, alleged to have taken place "at A., in the county of B., within five hundred yards of the boundary of D., to wit at C., in the county of D.," was proved to have been committed in D., the prisoner was acquitted, Mr. Justice Crompton observing, "If you choose to go out of your way to make a special averment, and to allege a particular place in

<sup>1</sup> *Leke's case*, Dyer, 365; *Turner v. Eyles*, 3 B. & P. 456; *R. v. Dendy*, 1 E. & B. 835, per Crompton, J.

<sup>2</sup> *R. v. Edwards*, R. & R. 497. Holroyd, J., there observed, that an indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole an animal, the law will intend that he stole it alive. <sup>3</sup> St. Ev. 434.

<sup>4</sup> *R. v. Deeley*, 1 Moo. C. C. 303; but see *R. v. Ogilvie*, 2 C. & P. 230, where the prosecutor being described as A. B., Esquire, the addition was rejected as surplusage by Burrough, J. So, in *R. v. Graham*, 2 Lea. 547, where the goods stolen were alleged to be the property of J. H., Esq., *commonly called Earl of C. in the Kingdom of Ireland*, it was held that the words marked in italics might be rejected as surplusage.

the indictment, the question is, whether you are bound to prove it. I think you are."<sup>1</sup> In these cases, the essential and non-essential parts of the statement were so connected and dovetailed, as to be incapable of separation, and therefore both were considered as alike material.

§ 263. The language of Mr. Justice Coleridge, cited above,<sup>2</sup> is § 214 also important, as showing that the law, which rejects surplusage, applies equally in criminal as in civil proceedings. Thus, if a party be indicted for robbery *in the dwelling house of A. B.*<sup>3</sup> or for arson *in the night time*,<sup>4</sup> the allegations marked in italics may be rejected as surplusage, and, consequently, need not be proved.<sup>5</sup> The case of *R. v. Jones* will illustrate this subject.<sup>6</sup> The repealed Act of 9 G. 4, c. 41, provided,<sup>7</sup> in § 29, that no person, not a parish patient, should be taken into a lunatic asylum without a certificate of two medical men, containing certain particulars. § 30 enacted, that any person who should *knowingly, and with intention to deceive*, sign such certificate, untruly setting forth such particulars, should be guilty of a misdemeanor; while a second clause made it a substantive offence for any physician, surgeon, or apothecary to sign such certificate, without having visited the patient. The indictment stated that the defendant, being a surgeon, *knowingly, and with intention to deceive, signed the certificate without having visited the patient*, thus blending in one charge two distinct offences. The jury negatived any intent to deceive, but found the defendant guilty; and the court held that the conviction was right, since the averment of intention was mere surplusage.

<sup>1</sup> *R. v. M'Kenna*, Ir. Cir. R. 416; see, also, *R. v. Durore*, 1 Lea. 351; 1 East, P. C. 45, S. C.; and *R. v. Upton-on-Severn*, 6 C. & P. 133.

<sup>2</sup> See ante, end of § 260.

<sup>3</sup> *R. v. Pye*, 2 East, P. C. 786; *R. v. Johnstone*, id. by all the judges; see, also, *R. v. Wardle*, R. & R. 9.

<sup>4</sup> *R. v. Minton*, 2 East, P. C. 1021.

<sup>5</sup> For other instances, see *R. v. Phillips*, R. & R. 369; *R. v. Oxford*, id. 382; *R. v. Summers*, 2 East, P. C. 785; *R. v. Hickman*, id. 593; 1 Lea. 318, S. C.; *R. v. Radley*, 1 Den. 450; *R. v. Otway*, 1 Ir. Law R., N. S. 69; *R. v. Williams*, 2 Den. 61; *R. v. Kealey*, id. 68; *R. v. Healey*, 1 Moo. C. C. 1; 2 Russ. C. & M. 786—789.

<sup>6</sup> 2 B. & Ad. 611.

<sup>7</sup> This Act was repealed by 2 & 3 W. 4, c. 107, which, in its turn, was repealed by 8 & 9 V., c. 100, which was amended, and partially repealed, by 16 & 17 V., c. 96, the Act now in force.



§ 264. So, where an indictment charged the defendants with § 214 conspiring to indict the prosecutor *falsely*, with intent to extort money, they were held to be rightly convicted, though the jury, in finding them guilty of conspiring to indict with the intent alleged, expressly negatived any conspiracy to make a false charge; for the court observed that a conspiracy to prefer an indictment for purposes of extortion was doubtless a misdemeanor, whether the charge was true or false.<sup>1</sup> So, where a parish was indicted for non-repair of a highway, an allegation that the road in question was an immemorial highway has been rejected as surplusage.<sup>2</sup> Upon an indictment, too, for *jointly* receiving stolen property, persons guilty of separately receiving any part of such property may be convicted.<sup>3</sup> If a common law offence be laid as committed "against the form of the statute," the allegation may be rejected as surplusage.<sup>4</sup>

§ 265. A second rule respecting variances is, that *cumulative* § 215 *allegations*, or such as merely *operate in aggravation*, are *immaterial*, provided that sufficient is proved to establish some right, offence, or justification, included in the claim, charge, or defence, specified on the record.<sup>5</sup> This rule, as applicable to criminal proceedings, was adopted and defined by Lord Ellenborough in the case of *R. v. Hunt*.<sup>6</sup> There the defendant was charged in an information with *composing*, printing, and publishing a libel, but no evidence was given to show that he was the *author*. His counsel thereupon claimed an acquittal on his behalf, but the learned judge observed, "It is enough to prove publication."<sup>7</sup> If an indictment charges that the defendant *did and caused to be done*<sup>8</sup> a particular act, it is

<sup>1</sup> *R. v. Hollingberry*, 4 B. & C. 329.

<sup>2</sup> *R. v. Turweston*, 16 Q. B. 109.

<sup>3</sup> 24 & 25 V., c. 96, § 94, enacts, that, "if upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property."

<sup>4</sup> *R. v. Mathews*, 5 T. R. 162. See, also, 14 & 15 V., c. 100, § 24, cited post, § 280, n.<sup>1</sup>.

<sup>5</sup> *R. v. Macpherson*, 39 L. J., P. C. 59; 11 Cox, 604, S. C.

<sup>6</sup> Camp. 583.

<sup>7</sup> S. P. in *R. v. Williams*, 2 Camp. 646, per Lawrence, J.

<sup>8</sup> S. P. per Ld. Mansfield, in *R. v. Middlehurst*, 1 Burr. 400.

enough to prove either. The distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified."

§ 266. Thus, on an indictment for murder the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation.<sup>1</sup> So, on an indictment for burglary and stealing, if the prosecutor establish his case with the exception of proving that the breaking was by night, the prisoner may be convicted of housebreaking;<sup>2</sup> if no breaking be proved, but the property stolen be laid in the indictment, and be proved by the evidence, to be of the value of five pounds, the verdict may be guilty of stealing in a dwelling-house to that amount;<sup>3</sup> if no satisfactory evidence be offered to show, either that the house was a dwelling-house, or some building communicating therewith; or that it was the dwelling-house of the party named in the indictment; or that it was locally situated as therein alleged; or that the stolen property was of the value of five pounds; still, the prisoner may be convicted of simple larceny, provided it appear that any goods were stolen by him.<sup>4</sup> So, on a charge of stealing in a dwelling-house with menaces,<sup>5</sup> or of stealing from the person, with or without violence,<sup>6</sup> or of stealing as a servant,<sup>7</sup> the prisoner may be found guilty of larceny, if the evidence be not sufficient to prove the commission of the more aggravated crime;<sup>8</sup> and an indictment under the statute for horse stealing, though bad for not describing the animal by any term used in the Act, will support a conviction for larceny.<sup>9</sup> Again, on the same principle, if an indictment for treason or conspiracy charge several overt acts, it is sufficient to prove one;<sup>10</sup> and, on an indictment for obtaining property by several false pretences, it is not necessary to prove them all, unless they

<sup>1</sup> Co. Lit. 282 a.

<sup>2</sup> Under 24 & 25 V., c. 96, § 56.

<sup>3</sup> Under 24 & 25 V., c. 96, § 60; see *R. v. Compton*, 3 C. & P. 418, per Gaselee, J.

<sup>4</sup> *R. v. Bullock*, 1 Moo. C. C. 423, n. a; *R. v. Brookes*, C. & Marsh. 543, per Patteson, J.; *R. v. Jackson*, cited 2 Russ. C. & M. 801, per Cresswell, J.

<sup>5</sup> See 24 & 25 V., c. 96, § 61.

<sup>6</sup> See 24 & 25 V., c. 96, §§ 40, 43.

<sup>7</sup> *R. v. Jennings*, Dears. & Bell, 447; 24 & 25 V., c. 96, § 67.

<sup>8</sup> 2 Hale, 302; 2 East, P. C. 784. <sup>9</sup> *R. v. Beaney*, R. & R. 416. <sup>10</sup> *Fost.* 194.

are so connected as to be incapable of separation,<sup>1</sup> but it will suffice to prove the one or more, by which the property was in fact obtained.<sup>2</sup>

§ 267. In like manner, if a compound intent, or several intents, § 217 be laid in the indictment, and if one part of the compound intent, or each of the several intents, when coupled with the act done, constitute an offence, it will not be necessary to prove the whole as laid. Thus, an indictment for killing a sheep with intent to steal the whole carcase, will be supported by proof of an intent to steal part of the carcase.<sup>3</sup> So, if a prisoner be charged with obtaining an order for a certain sum from the prosecutor with intent to defraud him of the *same*, he may be legally convicted, though it appears that his real intention was to cheat the prosecutor out of a small portion only of the proceeds of the order.<sup>4</sup> So, a man accused under the old law of assaulting a girl with intent to abuse her and carnally know her, has been found guilty of an assault with intent to abuse simply;<sup>5</sup> and a party indicted for publishing a libel with intent to defame certain magistrates, and also to bring the administration of justice into contempt, may be found guilty, if the libel was published with *either* of those intents.<sup>6</sup>

§ 268. But the intent proved must either correspond with, or be § 217 included in, the intent alleged. Thus it will be a fatal variance, if an indictment for burglary charge an intent to steal, and it be shown that the real intent was to commit rape or murder;<sup>7</sup> and a prisoner charged with burglary and stealing will be acquitted, if no

<sup>1</sup> R. v. Wickham, 10 A. & E. 34.

<sup>2</sup> R. v. Hill, R. & R. 190.

<sup>3</sup> R. v. Williams, 1 Moo. C. C. 107. That case was decided on the Act of 14 G. 2, c. 6 (now repealed), which speaks, in the alternative, of an intent to steal the whole carcase or any part of the carcase. The same point seems, however, to have been ruled by Cresswell, J., in R. v. Marley, cited 2 Russ. C. & M. 137, which case must have turned on the language of 7 & 8 G. 4, c. 29, § 25. This last Act uses the words "with intent to steal the carcase or skin, or any part of the cattle so killed," &c. The principle in both cases was the same, namely "that the offence of intending to steal a part was part of the offence of intending to steal the whole, and that the statute meant to make it immaterial whether the intent applied to the whole, or only to part." Per Cur. 1 Moo. C. C. 111.

<sup>4</sup> R. v. Leonard, 1 Den. 304.

<sup>5</sup> R. v. Dawson, 3 Stark. R. 62, per Holroyd, J. See 24 & 25 V., c. 100, § 52.

<sup>6</sup> R. v. Evans, 3 Stark. R. 35, per Bailey, J.

<sup>7</sup> 2 East, P. C. 514.

property was taken, though it appear that the house was entered with an intent to steal; and though, had larceny actually been committed, he would have been convicted without any allegation in the indictment of a felonious intent.<sup>1</sup>

§ 269. The rule under discussion has been adopted by the Legislature on several occasions. Thus, if a woman be charged with the murder of her infant, she may be convicted of endeavoring to conceal its birth;<sup>2</sup> if a person be indicted for felony in administering poison so as to endanger life, or to inflict grievous bodily harm, he may be convicted of the misdemeanor of administering poison with intent to injure, aggrieve, or annoy some one;<sup>3</sup> and on the trial of an indictment for simple or aggravated robbery, the jury may convict of a simple or aggravated assault with intent to rob, if the evidence shall prove such an offence to have been committed.<sup>4</sup> So, upon a count for maliciously wounding, or for maliciously inflicting grievous bodily harm, against the statute, a prisoner may be convicted of a common assault, even though the term "assault" be not found in the indictment.<sup>5</sup> Formerly, the Act of 7 W. 4 & 1 V., c. 85, § 11, provided, that if a party were indicted for any of the offences thereinbefore mentioned, or for any felony, where the crime charged included an assault against the person, the jury, though they acquitted him of the felony, might have found him guilty of the assault, *if the evidence warranted such finding*. Great difficulties, however, having arisen in the construction of this enactment,<sup>6</sup> it was repealed in 1851,<sup>7</sup> and a clause was substituted in its place,<sup>8</sup> which provides that, "if, on the trial of any person charged

<sup>1</sup> R. v. Furnival, R. & R. 445; R. v. Vandercomb, 2 East, P. C. 514.

<sup>2</sup> 24 & 25 V., c. 100, § 60.

<sup>3</sup> 24 & 25 V., c. 100, § 25.

<sup>4</sup> 24 & 25 V., c. 96, § 41; R. v. Mitchell, 2 Den. 468; 3 C. & Kir. 181, S. C. See R. v. Woodhall, 12 Cox, 240, per Denman, J.

<sup>5</sup> R. v. Taylor, 1 Law Rep., C. C. 194; 38 L. J., M. C. 106; and 11 Cox, 261, S. C.; R. v. Canwell, 11 Cox, 263; R. v. Oliver, 1 Bell, 218; 8 Cox, 334, S. C.; R. v. Yeadon, L. & Cave, 81; 9 Cox, 91, S. C. See, also, R. v. Guthrie, 11 Cox, 522; 1 Law Rep., C. C. 241; 39 L. J., M. C. 95, S. C.

<sup>6</sup> R. v. Bird, 2 Den. 94.

<sup>7</sup> 14 & 15 V., c. 100, § 10. The enactment in question appears to have been especially obnoxious to the Legislature, for, since 1851, it has been twice more repealed. See 24 & 25 V., c. 95, Sch.; and 24 & 25 V., c. 101, Sch.

<sup>8</sup> 14 & 15 V., c. 100, § 9. See R. v. M'Pherson, 26 L. J., M. C. 134.

with any felony or misdemeanor,<sup>1</sup> it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner, as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person, so tried as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

§ 270. In the Articles of War established for the government of the Navy, the rule, as illustrated in the three preceeding sections, is fully recognised. For instance, "the Naval Discipline Act, 1866,"<sup>2</sup> expressly enacts, in § 48, that "where any prisoner shall be charged with murder, a court-martial may find him guilty of manslaughter, or of a common assault; where he may be charged with sodomy, a court-martial may find him guilty of an indecent assault; where he shall be charged with theft, a court-martial may find him guilty of an attempt to thief, or of embezzlement, or of wrongful appropriation of property belonging to another; and generally, where any prisoner shall be charged with any offence under this Act, he may, upon failure of proof of the commission of the greater offence, be found guilty of another offence of the same class involving a less degree of punishment, but not of any offence involving a greater degree of punishment."

§ 270A. The Army Act, 1881,<sup>3</sup> contains provisions to the same effect in § 56, which enacts, that any prisoner charged before a court-martial with stealing may be found guilty of embezzlement, or of fraudulently misapplying money or property; and if he be charged with embezzlement may be convicted of stealing or of

<sup>1</sup> See *R. v. Ryland*, 11 Cox, 101; *R. v. Haggood & Wyatt*, id. 471.

<sup>2</sup> 29 & 30 V., c. 109.

<sup>3</sup> 44 & 45 V., c. 58.

fraudulent misapplication; and if he be charged with desertion may be found guilty of an attempt to desert, or of being abroad without leave; and if he be charged with attempting to desert may be found guilty of desertion or of illegal absence. The section then concludes with a general, but not very happily expressed, enactment, that "a prisoner charged before a court-martial with any other offence under this Act may, on failure of proof of an offence being committed under circumstances involving a higher degree of punishment, be found guilty of the *same* offence as being committed under circumstances involving a less degree of punishment."

§ 271. In civil actions the same rule prevails. Thus, in an action ; 219 for defamation, if the plaintiff allege special damage, he need not prove it, provided the words be actionable *per se*.<sup>1</sup> So in an action on a policy of insurance, the material allegation is the loss; but whether total or partial, is a mere question of degree; and if the former be alleged, proof of the latter is sufficient.<sup>2</sup> It seems scarcely necessary to add; that a party may claim in his statement of complaint a less right than he is able to prove, provided that the lesser right claimed does not differ in kind from, but is included in, the greater right proved.<sup>3</sup>

§ 278. The law recognises a third rule in regard to variances, ; 224 to the effect that mere *formal allegations* need not be proved. The term "*formal allegations*" comprises,—among other matters,—all those averments of *place, time, number, value, quality*, and the like, which may be inserted in the pleadings, without being either essentially descriptive of the subject of the claim or charge, or otherwise rendered material by special circumstances. It includes also a multitude of other idle statements, which in former times, English lawyers, with tautological pedantry, loved to introduce into every record of legal proceedings. While judges were content to bestow more attention on technical precision than on substantial justice, the rule in question was highly important; but since the late

<sup>1</sup> Smith v. Thomas, 2 Bing. N. C. 380, per Tindal, C. J.

<sup>2</sup> Gardner v. Croasdale, 2 Burr. 904; Benson v. Chapman, 2 H. of L. Cas. 696, 722; 8 Com. B. 950, 965, S. C.; King v. Walker, 2 H. & C. 384.

<sup>3</sup> Duncan v. Louch, 6 Q. B. 904, 914; Bailey v. Appleyard, 8 A. & E. 167, per Coleridge, J.

amendments in the law, it has fortunately become a matter more of historical curiosity than of present practical interest.

§ 280. So, far, indeed, as civil actions are concerned, the rule has § 226 passed into a dead letter; and even in the administration of criminal justice it has, by virtue of Lord Campbell's Act of 1851,<sup>1</sup> become of little importance, and a few examples will suffice to illustrate its operation. And first, as to averments of *place*. It is now sufficient in all cases, *excepting where local description is required*, to state in the margin of the indictment the county, city or other jurisdiction, as the venue for all the facts averred in the body of the indictment.<sup>2</sup>

<sup>1</sup> 14 & 15 V., c. 100, § 23, enacts, that "it shall not be necessary to state any venue in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue." § 24 enacts, that "no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of 'against the form of the statutes,' or vice versa, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence. § 25 enacts, that "every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court, before which any such objection shall be taken for the formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

<sup>2</sup> 14 & 15 V., c. 100, § 23, cited in last note. See, as to the former law,

Even before this salutary alteration was introduced into the law, it was held to be no objection in the case of a transitory felony, that there was no such parish in the county, as that in which the offence was stated to have been committed.<sup>1</sup>

§ 281. In indictments, however, for those offences which the law regards as bearing a *local character*, the proof respecting the place must still correspond with the allegation; though probably in most cases of variance on this point the courts would sanction an amendment of the record.<sup>2</sup> The distinction between local and transitory offences is not very clearly drawn, but in the former category may be safely included,—among others,—burglary,<sup>3</sup> but not highway-robbery;<sup>4</sup> house-breaking;<sup>5</sup> stealing in a dwelling-house;<sup>6</sup> sacrilege;<sup>7</sup> riotously demolishing churches, houses, machinery, &c.;<sup>8</sup> maliciously firing a dwelling-house, perhaps an out-house, but not a stack;<sup>9</sup> forcible entry;<sup>10</sup> poaching;<sup>11</sup> nuisances to highways;<sup>12</sup> and malicious injuries to sea-banks, mill-dams, or other local property. In most of these cases it is sufficient to allege and prove the parish, township, or other local district, less than a county, in which the offence was committed;<sup>13</sup> but in some, a more accurate description is necessary.

§ 282. Thus, an indictment for not repairing a highway must specify the situation of the road within the parish, and any substantial variance between the description and the evidence will be material.<sup>14</sup> So, on an indictment for night poaching, it has been

R. v. Hollond, 5 T. R. 624, 625; R. v. Haynes, 4 M. & Sel. 214; R. v. Feargus O'Connor, 5 Q. B. 16; 7 G. 4, c. 64, § 20.

<sup>1</sup> R. v. Woodward, 1 Moo. C. C. 323; R. v. Dowling, Ry. & M. 433.

<sup>2</sup> 14 & 15 V., c. 100, § 1, cited ante, § 249.

<sup>3</sup> 1 Russ. C. & M. 826; R. v. St. John, 9 C. & P. 40.

<sup>4</sup> R. v. Dowling, Ry. & M. 433.

<sup>5</sup> R. v. Bullock, cited in n. to 1 Moo. C. C. 324.

<sup>6</sup> R. v. Napper, 1 Moo. C. C. 44; R. v. Jarrald, L. & Cave, 301; 32 L. J. M. C. 258, S. C.

<sup>7</sup> Arch. Cr. Pl. 365.

<sup>8</sup> R. v. Richards, 1 M. & Rob. 177.

<sup>9</sup> R. v. Woodward, 1 Moo. C. C. 323.

<sup>10</sup> 2 Leon. 186.

<sup>11</sup> R. v. Ridley, R. & R. 515.

<sup>12</sup> R. v. Steventon, 1 C. & Kir. 55.

<sup>13</sup> See R. v. Napper, 1 Moo. C. C. 44.

<sup>14</sup> R. v. Great Canfield, 6 Esp. 136; R. v. Upton-on-Severn, 6 C. & P. 133; (3142)



held, by a majority of the judges, that the locus in quo must be described either by name, ownership, occupation, or abutments, and that it is not sufficient to allege that the prisoner was found "in a certain close in the parish of A."<sup>1</sup> If the defendant be charged with taking or destroying fish in water adjoining a dwelling-house, and if the boundary of any parish, township, or vill, happen to be in or by the side of such water, it is sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment, or in any such local district adjoining the water;<sup>2</sup> and if the charge be that of stealing oysters, or oyster brood, the bed, laying, or fishery may be described by name or otherwise, without stating it to be in any particular parish, township, or vill.<sup>3</sup> An indictment for an *affray* cannot be sustained, unless it contain an averment that the offence was committed in a public street or highway, and unless that averment be supported by corresponding proof.<sup>4</sup>

§ 283. It would be extremely difficult to advance any sensible argument in favour of this distinction, which the law recognises between local and transitory offences. On an indictment, indeed, against a parish for not repairing a highway, it may be convenient to allege, as it will be necessary to prove, that the spot out of repair is within the parish charged; and in those very few cases, where the statute upon which an indictment is framed, gives the penalty to the poor of the parish in which the offence is committed, a similar allegation may be properly inserted; but why a burglar should be entitled to more accurate information respecting the house he is charged with having entered, than the highway robber

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R. v. Steventon, 1 C. & Kir. 55. See R. v. March. Dow. of Downshire, 4 A. & E. 232; R. v. Waverton, 17 Q. B. 562. If a carriage-way is described as a bridle-way, the variance is material, R. v. St. Weonard's, 6 C. & P. 582. See, also, R. v. Lyon, Ry. & M. 151.

<sup>1</sup> R. v. Ridley, R. & R. 515, under the repealed Act of 57 G. 3, c. 90, § 1; R. v. Crick, 5 C. & P. 508, per Vaughan, B., under 9 G. 4, c. 69, § 9. In R. v. Owen, 1 Moo. C. C. 118, where the close was described by name and occupation, but the name proved was different from that alleged, the judges held that the variance was fatal. See R. v. Andrews, 2 M. & Rob. 37; and R. v. Eaton, 2 Den. 274; S. C. nom. R. v. Uezzell, 3 C. & Kir. 150.

<sup>2</sup> 24 & 25 V., c. 96, § 24.

<sup>3</sup> Id. § 26.

<sup>4</sup> R. v. O'Neill, 1 R., 6 C. L. 1.

can claim as to the spot where his offence is stated to have been committed, it is impossible to say; either full information should be given in all cases or in none.

§ 284. Averments of *time* in criminal proceedings are now even § 280 of less importance than those of *place*; for, excepting in the very few cases where *time is of the essence of the offence*, the indictment<sup>1</sup> need not contain any allegation respecting it.<sup>2</sup> Indeed, independent of the new law, the date specified in the indictment has been so far disregarded, that where a court had no jurisdiction to try a criminal, except for an offence committed after a certain day, the judges held that no objection could be taken to the indictment in arrest of judgment, for alleging that the act was done before that day, the jury having expressly found that this was not correct.<sup>3</sup>

§ 285. Allegations of *number* and *value* are, also, in general § 280 immaterial in indictments. Thus, if a party be charged with stealing five horses, he may be convicted of stealing one; or if he be indicted for larceny or robbery, and the property be laid as of the value of twenty shillings, the offence will be complete, though it appear that the article stolen was of less value than any

<sup>1</sup> The same law prevails with respect to coroner's inquisitions, 6 & 7 V., c. 83, § 2; *R. v. Ingham*, 5 B. & S. 257; 33 L. J., Q. B. 183, S. C.

<sup>2</sup> 14 & 15 V., c. 100, § 24, cited ante, § 280, n.<sup>1</sup>, on page 275. In rejecting the old rule, which required a day to be specified, but did not require that day to be proved, the Legislature has adopted my Uncle Toby's reply to the argument used by Corporal Trim, when telling his unfortunate story of the King of Bohemia. "'There was a certain King of Bohemia, but in what year of our Lord,'—'I would not give a halfpenny to know,' said my Uncle Toby. 'Only an' please your Honour, it makes a story look the better in the face.' 'Leave out the date entirely, Trim;'" said my Uncle, 'a story passes very well without these niceties, unless one is pretty sure of 'em!'"

<sup>3</sup> *R. v. Treharne*, 1 Moo. C. C. 298. In this case the court claimed jurisdiction under 11 G. 4 & 1 W. 4, c. 66, § 24, which provided that forgers and utterers might be tried in the county where they were apprehended or in custody. That Act came into operation on the 20th of July. The prisoner was tried where he was apprehended. The act of forgery complained of was laid in the indictment as having been committed on the 2nd July, but the jury found that it had been committed after the 20th. See, also, *R. v. Levy*, 2 Stark. R. 458.

coin of the realm, provided that it was of *some* value to the owner.<sup>1</sup> In certain cases, however, value is essential to constitute the offence; as where a bankrupt is indicted for fraudulently concealing or removing property to the value of ten pounds,<sup>2</sup> or for absconding with property to the amount of twenty pounds,<sup>3</sup> or a person is indicted for maliciously injuring property to an amount exceeding five pounds,<sup>4</sup> or a tenant is indicted for stealing a chattel or fixture let to him with his house or lodging, and exceeding the value of five pounds,<sup>5</sup> or a party is charged with stealing in a dwelling-house chattels, &c., to that amount,<sup>6</sup> or with stealing, or with destroying or damaging, either maliciously or with intent to steal, any trees in a park, pleasure-ground, garden, or orchard, above the value of one pound, or any trees elsewhere above the value of five pounds.<sup>7</sup>

§ 286. In such cases as these, the evidence must so far correspond § 230 with the allegation as to show that the statutable offence has been committed: that is, the property fraudulently or maliciously dealt with, stolen, or destroyed, must be proved, as well as alleged, to be of the requisite value; but if this be done, the exact amount specified in the indictment need not be proved. In *R. v. Forsyth*,<sup>8</sup> a bankrupt was charged with concealing his property, and the indictment,—after specifying many articles without stating the separate value of each,—added these words, “and also one hundred other

<sup>1</sup> *R. v. Morris*, 9 C. & P. 347, per Parke, B.; *R. v. Bingley*, 5 C. & P. 602, per Gurney, B.; *R. v. Clark*, R. & R. 181: The fact of the article being in the possession of the prosecutor is, in general, evidence that it was of value to him. *Id.*

<sup>2</sup> 32 & 33 V., c. 62, § 11, subs. 4, 5; as amended by 46 & 47 V., c. 52, § 163; 35 & 36 V., c. 57, § 11, subs. 4, 5, *Ir.*

<sup>3</sup> 32 & 33 V., c. 62, § 12; as amended by 46 & 47 V., c. 52, § 163; 35 & 36 V., c. 57, § 12, *Ir.*

<sup>4</sup> 24 & 25 V., c. 97, § 51. The damage must be done at one time, *R. v. Williams*, 3 New R. 338, per *Ir. C. C.*; 9 Cox, 338, S. C. The value of each article injured need not be stated, but it will be sufficient to allege that the amount of the aggregate damage exceeded 5*l.*, *R. v. Thoman*, 12 Cox, 54.

<sup>5</sup> 24 & 25 V., c. 96, § 74. If the value of the property stolen do not exceed 5*l.*, the prisoner is not liable to penal servitude. *Id.*

<sup>6</sup> 24 & 25 V., c. 96, § 60.

<sup>7</sup> 24 & 25 V., c. 96, § 32; 24 & 25 V., c. 97, §§ 20, 21. Where several trees have been stolen or damaged at the same time, their collective value will satisfy the Act; *R. v. Shepherd*, 37 L. J., M. C. 45; 1 Law Rep., C. C. 118; and 11 Cox, 119, S. C.

<sup>8</sup> R. & R. 274.

articles of furniture and a certain debt due from J. T. to the prisoner, to the value of twenty pounds and upwards;"<sup>1</sup> but the judges held that this indictment was bad, as all the property concealed was not specified, and no distinct value was put upon the articles enumerated. It would seem to follow from this case, that where value, being material, is ascribed to several articles *collectively*, the offence must be made out as to each of those articles.

§ 287. In an indictment for embezzlement against a clerk or servant, or against a person employed either in her Majesty's public service, or in the police, if the offence relate to any money or valuable security, it is sufficient to allege that money was embezzled, without specifying any particular coin or valuable security; and such allegation may be supported by equally loose evidence;<sup>2</sup> and it seems, even by proof of a general deficiency of money that ought to be forthcoming, without showing from what persons the money was received, or of what coins it consisted, or that any particular sum was received, and not accounted for by the prisoner.<sup>3</sup> So, also, "in any indictment in which it shall be necessary to make any averment as to any money,"<sup>4</sup> or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved; and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party

<sup>1</sup> This case was decided under the repealed Act of 5 G. 2, c. 30, § 1.

<sup>2</sup> 24 & 25 V., c. 96, § 71.

<sup>3</sup> *R. v. Grove*, 7 C. & P. 635; 1 Moo. C. C. 447, S. C., per eight judges, including the three chiefs, against the remaining seven.

<sup>4</sup> See *R. v. Gumble*, 2 Law Rep., C. C. 1; 42 L. J., M. C. 7, and 12 Cox, 248, S. C.

delivering the same, or to any other person, and such part shall have been returned accordingly.”<sup>1</sup>

§ 288. It is often allowable to omit from the indictment, and it § 232 is seldom necessary to prove with precision, allegations of *quality*; or, in other words, those allegations which describe the mode in which certain acts have been done. Thus, it is unnecessary in any indictment<sup>2</sup> for murder or manslaughter to set forth the manner in which, or the means by which, the death of the deceased was caused; but it is sufficient to charge in every indictment for murder that the defendant did felonously, wilfully, and of his malice aforethought kill and murder the deceased, and in every indictment for manslaughter, that he did felonously kill and slay him.<sup>3</sup> Should, too, an indictment for homicide unnecessarily allege the means of death, it would be quite sufficient for the proof to agree with the allegation in its general character, without precise conformity in every particular. So, if the charge be of a felonious assault with a staff, and the proof be of such an assault with a stone; or if a wound, alleged to have been given with a sword, be proved to have been inflicted by an axe; or if a pistol be stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive material,<sup>4</sup> the charge is substantially proved, and no variance occurs.<sup>5</sup>

§ 289. The fourth general rule which regulates the law of § 233

<sup>1</sup> 14 & 15 V., c. 100, § 18.

<sup>2</sup> This term includes inquisitions taken before coroners, *R. v. Ingham*, 33 L. J., Q. B. 183; 5 B. & S. 257, S. C.

<sup>3</sup> 24 & 25 V., c. 100, § 6.

<sup>4</sup> *R. v. Oxford*, 9 C. & P. 525, 548. See *R. v. Hughes*, 5 C. & P. 126, the marginal note of which is calculated to mislead.

<sup>5</sup> 1 East, P. C. 341; *R. v. Martin*, 5 C. & P. 128, per Parke, B.; 1 Russ. C. & M. 557. See further, as to the law prior to the passing of *Ld. Campbell's Act* in 1851, *R. v. M'Conkey*, Ir. Cir. R. 77, per Torrens, J.; *R. v. Waters*, 7 C. & P. 250; 1 Moo. C. C. 457, S. C.; *R. v. Culkin*, 5 C. & P. 121; *R. v. Thompson*, 1 Moo. C. C. 139; 1 Lew. C. C. 193, S. C.; *R. v. Kelly*, 1 Moo. C. C. 113; 1 Lew. C. C. 194, S. C.; 2 Hale, 185, 186; *R. v. Mosley*, 1 Moo. C. C. 97; 1 Lew. C. C. 189, S. C.; *R. v. Tomlinson*, 6 C. & P. 370, per Patteson, J.; *R. v. Turner*, 1 Lew. C. C. 177, per Parke, B.; *R. v. Warman*, 1 Den. 183.

variance, is that allegations of matter of *essential description* should be proved as laid. It is impossible to explain with precision the meaning of these words; and the only practical mode of understanding the extent of the rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases, always bearing in mind that the judges have large powers of granting amendments both in civil and in criminal proceedings.<sup>1</sup> And first, with respect to the criminal law, it is now clearly established, that the *name or nature of the property* stolen or damaged is *matter of essential description*. Thus, for example, if the charge be one of firing a stack of hay, and it turns out to have been a stack of wheat; or if a man be accused of stealing a drake, and it is proved to have been a goose, or even a duck, the variance is fatal, unless an amendment be permitted.<sup>2</sup> A diverting instance of the application of this rule, and one which forcibly illustrates the advantage of allowing amendments, occurred some years back at the assizes for Hertford. A man was charged with stealing "a slop." The theft was clearly proved; but, when called upon for his defence, the prisoner exclaimed, "Why, my lord, it ain't no slop." "You hear what he says," observed the judge, addressing the jury. "Is it a slop, gentlemen?" "No, my lord, it's a smock," said one of the jurymen. "Then you must acquit the prisoner." He was acquitted; but the grand jury not being discharged, a second indictment was preferred and found, charging him with stealing "a smock." Nothing daunted the prisoner now pleaded *autrefois acquit*, and called several witnesses to prove that the article he had stolen was in fact a slop, and this question was submitted to a second jury with much gravity by the learned judge.<sup>3</sup>

§ 290. With respect to the description of animals, the stealing of which is made a statutable offence, it would seem to be sufficient to use the generic term which includes the whole species, even though the Act should employ more specific language. This

<sup>1</sup> See ante, §§ 220—225, 249.

<sup>2</sup> Under § 1 of 14 & 15 V., c. 100, cited ante, § 249.

<sup>3</sup> 29 Law Mag. 12, 13.

doctrine has been recognised by the judges in a case of sheep stealing. The words of the Act<sup>1</sup> on which the indictment was founded, were, any "ram, ewe, sheep, or lamb;" the charge was of killing a sheep, with intent to steal the carcase; the proof was, that a sheep was killed, but the sex could not be discovered. Upon this, the prisoner's counsel contended, that the jury could not presume that the animal was a wether, and that, if it was an ewe, the indictment was bad; but a great majority of the judges, while they admitted that the first proposition was sound law, held that the word "sheep" was a generic term, which included equally rams, ewes, and wethers, and the conviction was accordingly confirmed.<sup>2</sup> So, an indictment for stealing a sheep will now be supported by evidence of killing a lamb.<sup>3</sup> Whether a charge of stealing a horse would be sustained by proof of stealing a gelding, a mare, a colt, or a filly,<sup>4</sup> is by no means clear; though, if the principle be carried out to its legitimate extent, it would seem that no variance would in such case arise.

§ 291. On prosecutions for forgery under the old law, great nicety used to be required in describing the instrument forged; and while that offence continued to be a capital crime, many a forger had reason to rejoice that an excessive minuteness of de- § 234A

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<sup>1</sup> 7 & 8 G. 4, c. 29, § 25. The same words are now contained in 24 & 25 V., c. 96, § 10.

<sup>2</sup> *R. v. McCulley*, 2 Moo. C. C. 34; 2 Lew. C. C. 272, S. C.; *R. v. Bannam*, Crawf. & D. C. C. 147. These cases overrule *R. v. Puddifoot*, 1 Moo. C. C. 247.

<sup>3</sup> *R. v. Spicer*, 1 C. & Kir. 699; 1 Den. C. C. 82, S. C., overruling *R. v. Loom*, 1 Moo. C. C. 160. The decision in *R. v. Loom* was under the repealed Act of 15 G. 2, c. 34, which, like the Act of 7 & 8 G. 4, c. 29, § 25, specified lambs as well as sheep. In an old Act of 25 H. 8, c. 13, §§ 2, 13, which is now repealed by 19 & 20 V., c. 64, and which prohibited persons from having above 2000 sheep, it was expressly enacted, that "lambs under the age of one whole year shall not be adjudged for sheep prohibited by the statute." The special insertion of such a clause leads rather to an inference, that, without it, the mention of the grown animal would have included the young. See next note.

<sup>4</sup> These are the words used in 24 & 25 V., c. 96, § 10. Under an old Act against horse-stealing, which only mentioned "horses, geldings, and mares," it was held that proof of stealing a *filly* supported an indictment for stealing a *mare*, *R. v. Welland*, *R. v. R.* 494.

scription afforded an opportunity of escape from the gallows by causing a variance between the allegations and the proofs. The law, however, is now happily amended, and the punishment for forgery has become less severe but more certain. The forger is no longer sentenced to death on conviction, but he seldom can claim an acquittal on the ground of some senseless technicality. The Act of 1861, which consolidates the law on this subject,<sup>1</sup> expressly enacts, in § 42, that, "in any indictment for forging, altering, offering, uttering, disposing of, or putting off, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof." A similar laxity of description is permitted, whenever any person is indicted for engraving or making "any instrument, matter, or thing," or for using or unlawfully possessing any plate, material, or paper on which any instrument, matter, or thing shall have been engraved, made, or printed.<sup>2</sup>

§ 292. In all indictments, too, for offences under the Debtors' Act, 1869,<sup>3</sup> or the Bankruptcy Act, 1883,<sup>4</sup> it is sufficient to "set forth the substance of the offence charged, in the words of the Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading adjudication, or any proceeding in, or order, warrant or document of, any court acting under the Bankruptcy Act, 1883."<sup>5</sup> The Irish Debtor's Act, 1872, contains a similar provision.<sup>6</sup>

§ 293. *The name of the person injured,*<sup>a</sup> and, indeed, the name of § 235

<sup>1</sup> 24 & 25 V., c. 98.

<sup>2</sup> 24 & 25 V., c. 98, § 43.

<sup>3</sup> 32 & 33 V., c. 62, § 19; amended by 46 & 47 V., c. 52, § 149, subs. 2.

<sup>4</sup> 46 & 47 V., c. 52, §§ 31, 163—167.

<sup>5</sup> 35 & 36 V., c. 57, § 19, Ir.

<sup>6</sup> See, as to the old law on this subject, *R. v. Biss*, 8 C. & P. 773; 2 Moo. C. C. 93, S. C.; *R. v. Robinson*, Holt, N. P. R. 595; *R. v. Campbell*, 1 C. & Kir. 82; *R. v. Waters*, 1 Den. 356; 2 C. & Kir. 864, S. C.; *R. v. Willis*, 1 Den. 80; *R. v. Stroud*, 1 C. & Kir. 187; 2 Moo. C. C. 270, S. C.; *R. v. Sweeny*, Ir. Cir. R. 366; *R. v. Smith*, 1 Moo. C. C. 402; 6 C. & P. 151, S. C.; *R. v. Evans*, 8 C. & P. 765; *R. v. Sheen*, 2 Id. 634; *R. v. Hogg*, 2 M. & Rob. 380.



every person necessarily mentioned in the indictment,<sup>1</sup> is generally matter of essential description, and must formerly have been proved with a precision which was but little calculated to engender any ardent feelings of respect for the criminal law. In the present day, however, there can be little room for doubt, that the court would in every case of mere *misnomer*<sup>2</sup> direct an amendment to be made almost as a matter of course;<sup>3</sup> but still a question may occasionally arise as to what the nature of the amendment ought to be. The following rules, therefore, may furnish some guide on this subject:—

1st. If the name of the injured party cannot be proved, it will suffice to describe him as a person “whose name is to the jurors unknown.”<sup>4</sup>

2nd. It is not necessary to describe a party by what is, in strictness, his right name; but it will be sufficient to state any name he has assumed,<sup>5</sup> or by which he is generally known, and the omission of a second christian name has been frequently held to be immaterial.<sup>6</sup>

3rd. An illegitimate child is not entitled to the surname either of the mother or of the putative father, but can only acquire a surname by reputation.<sup>7</sup>

4th. The proper mode of describing a peer is by his christian name and rank in the peerage; but the christian name may be omitted;<sup>8</sup> and it seems that under the degree of a duke, a nobleman may be designated by the simple title of “lord.”<sup>9</sup>

5th. Foreigners of rank may be described by

<sup>1</sup> See, as to the old law on this subject, *R. v. Dunmurry*, Ir. Cir. R. 312; *R. v. Walker*, 3 Camp. 264; *R. v. Bush*, R. & R. 372.

<sup>2</sup> See *R. v. Welton*, 9 Cox. 297.

<sup>3</sup> Under § 1 of 14 & 15 V., c. 100, cited ante, § 249.

<sup>4</sup> See *R. v. Welton*, 9 Cox, 297.

<sup>5</sup> *R. v. Norton*, R. & R. 510. See *R. v. Williams*, 7 C. & P. 298. In *R. v. Toole*, Dear. & Bell, 194; 7 Cox, 266, S. C., where the only proof of the prosecutor's christian name was the statement of a witness, who said that he had seen the prosecutor sign the charge against the prisoner, and the deposition before the magistrates, and that the signatures of those documents, which the witness identified, corresponded with the name laid in the indictment, the court held that the evidence was sufficient.

<sup>6</sup> *Att-Gen. v. Hawkes*, 1 Tyr. 3; *R. v. Berriman*, 5 C. & P. 601; *R. v. —*, 6 id. 408; *Williams v. Bryant*, 5 M. & W. 447; 2 Russ. C. & M. 795—797. But see *R. v. M'Anerney*, Ir. Cir. R. 270, per Crampton, J.

<sup>7</sup> *R. v. Waters*, 1 Moo. C. C. 457; 7 C. & P. 250, S. C.; *R. v. Clark*, R. & R. 358.

<sup>8</sup> *R. v. Frost*, Pearce & D. 474.

<sup>9</sup> *R. v. Pitts*, 8 C. & P. 771, where the prosecutor was described as “George Talbot Rice, Lord Dynevor,” instead of “George Talbot, Baron Dynevor;”

their christian names and foreign titles, provided they be generally known by those appellations;<sup>1</sup> or it will suffice, as it seems, to describe them by their christian and surnames, with the addition of the word esquire, that being the title which English courtesy confers on foreign noblemen.<sup>2</sup> 6th. If a parent and child bear the same name, it will suffice in an indictment to describe the latter by that name without the addition of "junior."<sup>3</sup> And lastly, where joint-stock companies, trustees, or other joint owners have been injured, several Acts of Parliament have been passed, which render it sufficient in such cases to describe in the indictment one person only by name, and to state that the offense has been committed against that person, and another or others, as the case may be.<sup>4</sup> By a statute passed in the present reign,<sup>5</sup> the same laxity of de-

R. v. Elliott, id. 772, where the words were, "The Right Honourable William Fitzhardinge, Lord Segrave," he being an earl. It seems that "Edward, Bishop of Hereford," is not a right description, id. 771.

<sup>1</sup> R. v. Gregory, 8 Q. B. 508, where the prosecutor was held sufficiently described as "Charles Frederick Augustus William, Duke of Brunswick and Luneberg," his name being Ch. Fr. Aug. Wm. D'Este, and he having ceased to be the reigning Duke; R. v. Sulls, 2 Lea. 861, where, in an indictment for larceny, the goods stolen were held to be properly laid as the property of Victory, Baroness Turkheim, the prosecutrix being an Alsatian lady, whose real name was Selina Victoire. In both these cases the parties were well known by the names used.

<sup>2</sup> R. v. Graham, 2 Lea. 547.

<sup>3</sup> R. v. Peace, 3 B. & A. 579; R. v. Hodgson, 1 Lew. C. C. 236, per Parke, B.; R. v. Bland, id., per Bolland, B.; Sweeting v. Fowler, 1 Stark. R. 106; R. v. Bayley, 7 C. & P. 264. See ante, § 195.

<sup>4</sup> 7 G. 4, c. 64, § 14, enacts, that "in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession of, more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint-stock companies and trustees." See, also, 7 G. 4, c. 46, § 9.

<sup>5</sup> 11 & 12 V., c. 43, § 4, enacts that "in any information or complaint, or the proceedings thereon, in which it may be necessary to state the ownership of any property belonging to or in the possession of partners, joint tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state the property to belong to the person so named, and another or others, as the case may be; and whenever in any information or complaint, or the proceedings thereon, it shall be necessary to mention, for any purpose what-

scription is allowed, under certain circumstances, in informations or complaints before justices of the peace.

§ 294. In some few instances the Legislature has still further in- § 235A  
terposed for the purpose of avoiding the danger of variance, and has expressly enacted, that, to justify a conviction for certain offences, the name of the injured party need neither be alleged nor proved. For instance, if a person be indicted for any offence against the Act of 1861 relating to malicious injuries to property, it will suffice to allege and prove that he did the act charged with intent to injure or defraud, and no allegation or proof is necessary that the prisoner intended to injure or defraud any particular person.<sup>1</sup> The same law prevails in all prosecutions "for forging, altering, uttering, offering, disposing of, or putting off, any instrument,"<sup>2</sup> or for obtaining, or attempting to obtain, any chattel, money, or valuable security by false pretences;<sup>3</sup> and, in this last case the indictment will be good, "without alleging any ownership of the chattel, money, or valuable security."<sup>4</sup> So, also, in all indictments for stealing, or fraudulently

soever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in manner aforesaid; and whenever in any such information or complaint, or the proceedings thereon, it shall be necessary to describe the ownership of any work or building made, maintained, or repaired at the expense of any county, riding, division, liberty, city, borough, or place, or of any materials for the making, altering, or repairing of the same, they may be therein described as the property of the inhabitants of such county, riding, division, liberty, city, borough, or place respectively; and all goods provided by parish officers for the use of the poor may, in any such information or complaint, or the proceedings thereon, be described as the goods of the churchwardens and overseers of the poor of the parish, or of the overseers of the poor of the township or hamlet, or of the guardians of the poor of the union to which the same belong, without naming any of them; and all materials and tools provided for the repair of highways, at the expense of parishes or other districts in which such highways may be situate, may be therein described as the property of the surveyor or surveyors of such highways respectively, without naming him or them; and all materials or tools provided for making or repairing any turnpike roads, and buildings, gates, lamps, boards, stones, posts, fences, or other things erected or provided for the purpose of any such turnpike road, may be described as the property of the commissioners or trustees of such turnpike road, without naming them; and all property of the commissioners of sewers of any district may be described as the property of such commissioners, without naming them."

<sup>1</sup> 24 & 25 V., c. 97, § 60. See *R. v. Newbould*, 41 L. J., M. C. 63.

<sup>2</sup> 24 & 25 V., c. 98, § 44.

<sup>3</sup> 24 & 25 V., c. 96, § 88.

<sup>4</sup> 24 & 25 V., c. 96, § 88.

destroying, or concealing wills,<sup>1</sup> or for stealing, or fraudulently taking, or maliciously destroying, records or legal documents,<sup>2</sup> or for stealing fixtures attached to any square, street, or place dedicated to public use or ornament,<sup>3</sup> it is not necessary to allege that "the article in respect of which the offence is committed is the property of any person.

§ 295. The name of the prisoner is not a matter of essential <sup>§ 236</sup> description, because on this subject the prosecutor may have no means of obtaining correct information. If, therefore, the prisoner's name or addition be wrongly described, or if the addition be omitted, the court may correct the error, and call upon the prisoner to plead to the amended indictment.<sup>4</sup>

§ 296. The rule which renders it necessary to prove essentially <sup>§ 237</sup> descriptive allegations need not, in this place, be illustrated with respect to civil actions, because the question has already been discussed, while examining the cases that have been decided on the Rules authorising amendments.<sup>5</sup>

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<sup>1</sup> 24 & 25 V., c. 96, § 29.

<sup>2</sup> Id. § 30.

<sup>3</sup> Id. § 31.

<sup>4</sup> 7 G. 4, c. 64, § 19, enacts, that "no indictment or information shall be abated by reason of any dilatory plea of misnomer, or want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded. See *R. v. Orchard*, 8 C. & P. 565, where a woman charged with the murder of her husband, being described as "A., the wife of B. C.," the record was amended by inserting the word "widow" instead of "wife," per *Ld. Abinger*.

<sup>5</sup> Ante, § 227, et seq.

## CHAPTER II.

## CONFINING EVIDENCE TO POINTS IN ISSUE.

§ 298. THE *second general rule*, which governs the production of testimony, is, that *the evidence must be confined to the points in issue*. This rule is founded upon the consideration that, since these points have been alone selected by the parties in their pleading, as those on which they are mutually willing to rest the fate of the cause,<sup>1</sup> any evidence in support of other facts which, not being expressly alleged, must be assumed to have no existence, or not being expressly denied, must be admitted to be true, would be obviously improper. Thus, where to an action of contract the defendant pleaded the statute of limitations, to which there was a replication that he did promise within six years, and issue thereon, the plaintiff was not allowed to prove that the action was grounded on a fraudulent receipt of money by the defendant, and that the fraud was first discovered within six years from the commencement of the suit.<sup>2</sup> So, where in covenant, the breach assigned was that the defendant had not used the plaintiff's farm in a husbandlike manner, but had committed waste, evidence of bad husbandry not amounting to waste was rejected.<sup>3</sup> Again, in an action of defamation, where the issues raised by the pleas of justification were whether the plaintiff's scholars were ill fed, badly lodged, and covered with vermin, the defendant's counsel was not permitted to put any questions to the witnesses, with the view of showing that the boys were also badly educated;<sup>4</sup> and in another action of the same kind, where the defendant had only pleaded the general issue, Lord Ellenborough would not allow the plaintiff to prove that the assertions contained in the libel were false. "There is no plea of justification on the

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<sup>1</sup> Steph. Pl. 115.

<sup>2</sup> Clark v. Hougham, 2 B. & C. 149.

<sup>3</sup> Harris v. Mantle, 3 T. R. 307.

<sup>4</sup> Boldron v. Widdows, 1 C. & P. 65.

record," said his Lordship, "and, therefore, I can no more hear a falsification on one side, than a justification on the other."

§ 299. The cases just cited in illustration of this rule have been selected at hazard; but in order to obtain practical information on this important subject, it may be advisable to examine at some length the *rules of pleading*, together with the leading decisions explanatory of their operation.<sup>2</sup> These rules, which are principally embodied in Order XIX. of the Rules of the Supreme Court, 1883, and which came into force on the 24th of October in that year, are intended,—like those which they supersede,—to effect three material objects: first, to make each party acquainted with the intended case of his opponent, and thus to prevent either side from being taken by surprise at the trial; secondly, to save the expense of collecting unnecessary evidence; and thirdly, to bring *legal* defences more prominently forward on the face of the record.<sup>3</sup>

§ 300. With the view of attaining these objects the rules provide, in general terms, that all pleadings shall henceforth consist: first, of a statement of claim, and of the relief or remedy sought;<sup>4</sup> next, of a defence, set-off, or counter-claim;<sup>5</sup> thirdly, of a reply,<sup>6</sup> if any, and lastly, of a joinder of issue on the one side or the other.<sup>7</sup> They further provide, that "such statements shall be as brief as the nature of the case will admit,"<sup>8</sup> and that "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies, but not the *evidence* by which they are to be proved."<sup>9</sup> For example, if an agreement be alleged in any pleading, it is not sufficient to aver generally

<sup>1</sup> *Stuart v. Lovell*, 2 Stark. R. 94; *Cornwall v. Richardson*, Ry. & M. 305.

<sup>2</sup> Most of the cases referred to in the following observations were decided with respect to the old rules of pleading; but, that fact being borne in mind, they will serve to illustrate the present rules.

<sup>3</sup> See *Isaac v. Farrer*, 1 M. & W. 70, per Ld. Abinger; 4 Dowl. 755, S. C.; *Barnett v. Glossop*, 1 Bing. N. C. 636, 637, per Park and Bosanquet, Js.; 3 Dowl. 625, S. C.; *Gutsole v. Mathers*, 1 M. & W. 502, 503, per Ld. Abinger.

<sup>4</sup> Ord. XIX., R. 2.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Ord. XIX., R. 18. See post, § 304, also § 829, and Ord. XXVII., R. 13, there cited.

<sup>8</sup> R. 2.

<sup>9</sup> R. 4. See *Heap v. Marris*, L. R., 2 Q. B. D. 630; 46 L. J., Q. B. 761, S. C.; *Phillips v. Phillips*, 48 L. J., Q. B., 135, per Ct. of App.; L. R., 4 Q. B. D. 127, S. C.

its existence, and to state its effect, but the party relying on it should state whether it be in writing, or by parol, or the result of a series of documents.<sup>1</sup> In the case of *Millington v. Loring*<sup>2</sup> the meaning of the phrase "material facts" was much discussed, the Divisional Court holding that it should be confined to such matters as are necessary to establish the cause of action or the defence, but the Court of Appeal deciding, that the words will include any facts which the party pleading is entitled to prove at the trial. Thus, in an action for breach of promise of marriage, the plaintiff may allege in her statement of claim her consequent seduction or infection, if any, such averments being regarded in the light of important matters of aggravation.<sup>3</sup>

§ 301. In addition to these cardinal propositions, twelve other pleading rules may here be cited as having a material bearing on the Law of Evidence. First comes Rule 13 of Order XIX., which provides that "every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be *taken to be admitted*,"<sup>4</sup> except as against an infant, lunatic, or person of unsound mind not so found by inquisition." Under Rule 14, "any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be *implied* in his pleading." Rule 15 next provides, that "the defendant or plaintiff, as the case may be, must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or

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<sup>1</sup> *Turquand and the Capital and Counties Bk. v. Fearon*, 48 L. J., Q. B. 703, per Ct. of App.

<sup>2</sup> L. R., 6 Q. B. D. 190; 50 L. J., Q. B. 214, S. C.

<sup>3</sup> *Id.*

<sup>4</sup> See *Tildesley v. Harper*, 48 L. J., Ch. 495, per Ct. of App., overruling S. C. L. R., 7 Ch. D. 403, per Fry, J.; *Harris v. Gamble*, L. R., 7 Ch. D. 877, per Fry, J.; 47 L. J., Ch. 273, S. C.; *Rutter v. Tregent*, 48 L. J., Ch. 791; L. R., 12 Ch. D. 758, S. C.

that the transaction is either void or voidable in point of law,<sup>1</sup> and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud,<sup>2</sup> the Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds." According to Rule 16, "No pleading, not being a petition or summons, shall,—except by way of amendment,<sup>3</sup>—raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

§ 302. By virtue of Rule 17 "it shall not be sufficient for a defendant in his statement of defence to deny *generally* the grounds alleged by the statement of claim,<sup>4</sup> or for a plaintiff in his reply to deny *generally* the grounds alleged in a defence by way of counter-claim, but each party must deal *specifically* with each allegation of fact of which he does not admit the truth, except damages." Rule 18 provides, that, "subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading.<sup>5</sup> Such joinder of issue shall operate as

<sup>1</sup> An exception to this proposition is contained in Ord. XXI., R. 21, which provides, that "no defendant in an action for the recovery of land, who is in possession by himself or his tenant, need plead his *title*, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff." It will suffice in such case to state that he is in possession, and such statement will put the plaintiff to the proof of his case; see *Danford v. M'Anulty*, 50 L. J., Q. B. 294, per Ct. of App.; L. R., 6 Q. B. D. 645, S. C.; L. R., 8 App. Cas. 456, S. C., per Dom. Proc.; and 52 L. J., Q. B. 652.

<sup>2</sup> See post, § 306.

<sup>3</sup> See, also, Ord. XXIII., R. 6, which provides, that "no new assignment shall be necessary or used. But everything which was formerly alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim, or by way of reply. See *Earp v. Henderson*, L. R., 3 Ch. D. 254; 45 L. J., Ch. 738, S. C., as explained by *Hall v. Eve*, L. R., 4 Ch. D. 341; 46 L. J. Ch. 146, S. C.

<sup>4</sup> See *Harris v. Gamble*, L. R. 7 Ch. D. 877, per Fry, J.; 47 L. J., Ch. 273, S. C.; *Rutter v. Tregent*, 48 L. J., Ch. 791, L. R. 12 Ch. D. 758, S. C.

<sup>5</sup> As to the effect of not delivering a reply, or any subsequent pleading within the proper period, see Ord. XXVII., R. 13, cited post, § 829.



a denial of every material allegation of facts in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted."

§ 303. It will be noticed that in their practical effect these last two rules almost entirely<sup>1</sup> do away with what used to be termed by Special Pleaders "the General Issue," so far as the statement of defence is concerned, though,—at the option of the parties,—they retain in the *reply* or any *subsequent pleading* that sweeping form of traverse. Their operation on the *plea* will be best understood by referring to the former law on that subject, and pointing out how it differs from the present practice. Under the old forms of pleading, whenever the defendant could show that in fact no *debt* ever existed before action brought, he might do so under the plea of "never indebted." For instance, if the action were for *goods sold and delivered*, he might defend himself under that plea, by proving that they were paid for by ready money;<sup>2</sup> that they were sold on credit, which was unexpired when the action was commenced;<sup>3</sup> that they were bought through an agent, and that before the expiration of the credit, the defendant had remitted the price of the goods to the agent;<sup>4</sup> that they were sold under a condition, that if they did not answer their purpose nothing should be paid for them, and that in fact they did not answer their purpose;<sup>5</sup> that they were sold under any special agreement, which had not been performed;<sup>6</sup> that they were delivered under a contract of barter;<sup>7</sup> that the goods delivered

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<sup>1</sup> See post, § 311.

<sup>2</sup> *Bussey v. Barnett*, 9 M. & W. 312. But see *Littlechild v. Banks*, 7 Q. B. 739.

<sup>3</sup> *Broomfield v. Smith*, 1 M. & W. 542, overruling *Edmonds v. Harris*, 2 A. & E. 414; 4 N. & M. 182, S. C.

<sup>4</sup> *Smyth v. Anderson*, 7 Com. B. 21.

<sup>5</sup> *Grounseil v. Lamb*, 1 M. & W. 352. See *Lamond v. Davall*, 9 Q. B. 1030.

<sup>6</sup> *Broomfield v. Smith*, 1 M. & W. 543, per Ld. Abinger; *Garey v. Pike*, 10 A. & E. 512; 2 P. & D. 427, S. C.; *Hayelden v. Staff*, 5 A. & E. 153; 6 N. & M. 659, S. C.; *Mosely v. M'Mullen*, 6 Ir. Law R., N. S. 69.

<sup>7</sup> *Harrison v. Luke*, 14 M. & W. 139, *Smith v. Winter*, 12 Com. B. 487; *Bracegirdle v. Hinks*, 9 Ex. R. 361.

did not answer the description of the articles, which the vendor professed to sell;<sup>1</sup> or that they turned out to be utterly useless.<sup>2</sup>

§ 303A. So, in an action for use and occupation, the defence that the premises were held under a demise at a rent payable quarterly, and that *before* the rent became due, either the plaintiff,<sup>3</sup> or his superior landlord,<sup>4</sup> evicted the defendant, or the former accepted a surrender of a term from him, might have been given in evidence under the "general issue." The defendant might, also,<sup>5</sup> have proved under the same plea that, *before* the rent was due, he received notice from a mortgagee of the premises to pay the rent to him;<sup>6</sup> but if the mortgagee's claim had not been made until *after* the rent had accrued, and the plaintiff's right of action had consequently *vested*, the demand would have furnished no defence.<sup>7</sup> In a similar action, the defendant might probably have shown, under the plea of never indebted, that the premises were uninhabitable,<sup>8</sup> when such a defence was a bar to the action;<sup>9</sup> or that there had been no actual entry by him;<sup>10</sup> or that his occupation had not been by the sufferance of the plaintiff;<sup>11</sup> or that he had originally occupied the premises by the permission of a prior owner, to whom he had paid all arrears of rent

<sup>1</sup> Gompertz v. Bartlett, 2 E. & B. 849. There an unstamped bill of exchange, purporting to be a foreign bill, had been sold, but on proof that it was really drawn in London, the vendee was held entitled to recover back the price of the bill, on the ground of a failure of consideration. See now 33 & 34 V., c. 97, § 52, cited ante, § 72.

<sup>2</sup> Cousins v. Paddon, 2 C. M. & R. 457; 4 Dowl. 488; 5 Tyr. 535, S. C., recognised by Ld. Denman in Hayselden v. Staff, 5 A. & E. 162; Baillie v. Kell, 4 Bing. N. C. 638; 6 Scott, 379, S. C.; Chapel v. Hicks, 2 C. & M. 214; Allen v. Cameron, 3 Tyr. 907. These cases overrule Roffey v. Smith, 6 C. & P. 682.

<sup>3</sup> Prentice v. Elliott, 5 M. & W. 606; Dodd v. Acklom, 6 M. & Gr. 672.

<sup>4</sup> Selby v. Browne, 7 Q. B. 620.

<sup>5</sup> See Hickman v. Machin, 4 H. & N. 716.

<sup>6</sup> Waddilove v. Barnett, 2 Bing. N. C. 538; 2 Scott, 763; 4 Dowl. 347, S. C., recognised in Hayselden v. Staff, 5 A. & E. 159. See ante, § 102.

<sup>7</sup> Wilton v. Dunn, 17, Q. B. 249, overruling on this point Waddilove v. Barnett, 2 Bing. N. C. 538, and Pope v. Biggs, 9 B. & C. 245. See Hickman v. Machin, 4 H. & N. 716.

<sup>8</sup> Smith v. Marrable, 11 M. & W. 5, 8, 9, per Parke, B.

<sup>9</sup> See same case, and compare it with Sutton v. Temple, 12 M. & W. 52; Hart v. Windsor, id. 69; Gott v. Gandy, 2 E. & B. 845; Murray v. Mace, I. R., 8 C. L. 396; and Wilson v. Finch Hatton, L. R., 2 Ex. D. 336.

<sup>10</sup> Lowe v. Ross, 5 Ex. R. 553; overruling a dictum of Tindal, C. J., in Atkins v. Humphrey, 2 Com. B., 654. <sup>11</sup> Powell v. Hibbert, 15 Q. B. 129.

without having received any notice of an assignment to the plaintiff;<sup>1</sup> or that he had been let into possession by the plaintiff, under a contract to purchase, which had contained no stipulation as to the terms of occupancy, and which afterwards had gone off in consequence of the plaintiff's inability to make out a good title;<sup>2</sup> or, in short, the defendant might have given in evidence any other fact, which would have proved that he had never so occupied the premises as to render him liable, in point of law, to the payment of rent.<sup>3</sup> Now, all these several defences require to be *specifically* set out in the statement of defence.

§ 304. In stating, as is done in Rule 18, that the plaintiff "by his reply *may* join issue upon the defence," "it is not intended that he *must* take that course; but,—excepting in a case where, under the old system of common law pleading, a new assignment would have been necessary,<sup>4</sup>—he may still, instead of amending his claim under Order XXVIII., either traverse the allegations in the defence generally or specially, or confess and avoid them, or unite in one reply those several answers.<sup>5</sup>

§ 305. Under Rule 19, "when a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so *evasively*, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances." For, in interpreting this rule, as well as those which provide that facts not denied must be taken as admitted,<sup>7</sup> and that facts denied must be specifically denied,<sup>8</sup> the

<sup>1</sup> Cook v. Moylan, 1 Ex. R. 67; 5 Dowl. & L. 101, S. C.

<sup>2</sup> Winterbottom v. Ingram, 7 Q. B. 611. See Hall v. Vaughan, 6 Price. 157; Hearn v. Tomlin, Pea. R. 192, per Ld. Kenyon; Howard v. Shaw, 8 M. & W. 118; Kirtland v. Pownsett, 2 Taunt. 145; Markey v. Coote, 1. R., 10 C. L. 149.

<sup>3</sup> Smith v. Marrable, 11 M. & W. 8, 9, per Parke, B.

<sup>4</sup> See ante, § 302.

<sup>5</sup> See ante, p. 202, n. <sup>3</sup>.

<sup>6</sup> Hall v. Eve, L. R., 4 Ch. D. 341, per Ct. of App.; 46 L. J., Ch. 145, S. C.

<sup>7</sup> See Rule 13, cited ante, § 301.

<sup>8</sup> See Rule 17, cited ante, § 302. See Green v. Sevin, L. R., 13 Ch. D. 589, per Fry, J.

courts very properly will enforce a strict observance of the language used. That language was intended to be construed strictly, in order to enable each party to know what the *real* issues between him and his opponent are. The whole meaning of the system is to narrow the parties to definite and distinct issues, and thereby to diminish expense and delay, especially as regards the amount of oral testimony required on either side at the trial.<sup>1</sup> In a case which called forth the above remarks from the Master of the Rolls, the plaintiff prayed for a dissolution of partnership, stating that he and the defendant had become partners under a parol agreement, and that the terms of the arrangement had been definitely agreed upon at a certain interview. The defendant, in his statement of defence, admitted the agreement, but denied that the terms had been "definitely agreed upon as alleged." Sir George Jessel held that this denial was *evasive* within the meaning of the rule. "The words 'as alleged,' " said his Lordship, "mean the whole allegations of the statement of claim, not of the particular paragraph. I cannot tell from his pleading what part of the plaintiff's allegations the defendant means to deny. He may mean to deny that the terms were definitely agreed upon at the interview of the 17th of September, although they were definitely agreed upon on some other day, or he may have some peculiar view as to the meaning of the word 'definitely.' He may not be able to say that the terms were not arranged as agreed upon, but he may take the word 'definitely' because he thinks it may give him some mode of escape. I cannot make out what he means. He is bound, if he intends to deny, to deny that any terms of arrangement have ever been come to, if that is what he means. If he does not mean that, he should deny that any terms of arrangement were ever come to except the following, and then state what those terms were; otherwise, there is no specific denial."<sup>2</sup>

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<sup>1</sup> *Thorp v. Holdsworth*, 45 L. J., Ch. 406, 408, per Jessel, M.R.; L. R., 3 Ch. D. 637, S. C.; *Byrd v. Nunn*, L. R., Ch. D. 781, per Fry, J.; S. C. aff. by Ct. of App., 47 L. J., Ch. I; and L. R., 7 Ch. D. 284; *Tildesley v. Harper*, 48 L. J., Ch. 495, per Ct. of App., overruling S. C., L. R., 7 Ch. D. 403, per Fry, J.; *Collete v. Goode*, L. R., 7 Ch. D. 842, per Fry, J.; 47 L. J., Ch. 370, S. C.

<sup>2</sup> *Thorp v. Holdsworth*, 45 L. J., Ch. 408, 409.

§ 306. Rule 20 provides, that "when a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the *legality* or *sufficiency in law*, of such contract, promise, or agreement, whether with reference to the *Statute of Frauds* or otherwise." The effect of this last rule is, that, whenever a party intends to rely on the illegality or insufficiency in law of any contract, whether with reference to the Statute of Frauds, or otherwise, he must *specially* plead such illegality or insufficiency, and it will not be sufficient to traverse allegations made by his opponent in anticipation of objections to the contract upon such grounds.<sup>1</sup> Neither can a defendant avail himself of the Statute of Frauds by simply raising in general terms by his pleading a point of law<sup>2</sup> (such being the new fangled substitute for the old general demurrers),<sup>3</sup> nor will it suffice for him to state generally that he relies on a statute, as, for instance, the Statute of Frauds, but the facts which make the statute applicable must also distinctly appear on the pleadings.<sup>4</sup>

§ 307. Again, Rule 5 of Order XXI, provides, that "if either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically."

§ 308. In some few instances it will be difficult to reconcile the language employed in this last rule, and also that used in Rule 13 of Order XIX,<sup>5</sup> with the special enactments contained in several Acts of Parliament. For example, if an action be brought to recover a doctor's bill, and the plaintiff allege in his statement of claim that

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<sup>1</sup> Clarke v. Callow, 46 L. J., Q. B. 53, per Ct. of App.

<sup>2</sup> Fitcher v. Fitcher, 50 L. J., Ch. 735, per Fry, J.

<sup>3</sup> Ord. XXV., RR. 1, 2.

<sup>4</sup> Pullen v. Snelus, 48 L. J., C. P. 394.

<sup>5</sup> Cited ante, § 301.

he is a "legally qualified medical practitioner,"<sup>1</sup> what will be the effect of the defendant omitting to traverse that special allegation? According to the New Rules, this amounts to an admission of the fact not traversed. But then, what effect is to be given to "The Medical Act"<sup>2</sup> of 1858, which,—in order to diminish the public mischief caused by quackery,—expressly enacts, in § 32, that "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall *prove* upon the trial that he is registered under the Act?" Will it be open to the defendant to contend, that an admission is not strictly proof, but only a *substitute for proof*, and that in spite of his defective pleading, the court must take care that the registration of the plaintiff be duly *proved* at the trial? If this reasoning be not recognised, the law, as it exists, is exposed to the absurd anomaly that a quack doctor, who must inevitably be nonsuited in any county court, may have a fair chance of recovering his charges, if he elects to sue in the High Court.

§ 309. Again, can the objection that an instrument is *not stamped* or is insufficiently stamped, be taken at the trial by a party, who has not relied on that point in his pleading? And if he can do so on ordinary occasions, is the same course open to him, when his opponent has affirmatively alleged in his pleading that the document in question has been duly stamped? If either of these queries be answered in the negative,—and if the New Rules are strictly interpreted they must be so answered,—then arises the following question; what steps must be taken either by the presiding judge, or by the ministerial officer of the court, so as to protect the interests of the Revenue, where the fiscal rights of the Crown have been obviously set at nought by one or both of the litigants?<sup>3</sup>

§ 310. The question how far a defendant can avail himself of § 27

<sup>1</sup> See 21 & 22 V., c. 90, § 34.

<sup>2</sup> 21 & 22 V., c. 90.

<sup>3</sup> See *Field v. Woods*, 7 A. & E. 114; 2 N. & P. 117, S. C.; *Dawson v. MacDonald*, 2 M. & W. 26; *M'Dowall v. Lyster*, id. 52. See, also, post, § 397.

want of jurisdiction in the court without raising that defence by means of a special plea, does not seem to have been set at rest by the New Rules of Pleading, and, independent of those rules, has been left in an unsatisfactory state by the case of *Spooner v. Juddow*.<sup>1</sup> There the Judicial Committee of the Privy Council decided, that when the facts ousting the jurisdiction are brought by the plaintiff himself to the notice of the court, the mere omission of the defendant to plead specially will not give the court jurisdiction over the suit, but it will be bound, whatever be the nature of the issues raised, either to nonsuit the plaintiff, or to direct a verdict for the defendant. The court, however, declined to state what would be the law, if the plaintiff were to close his case without betraying the want of jurisdiction, and the defendant were then, without any special plea raising the point, to offer evidence of facts with a view of showing that the cause of action was *ultra vires*.

§ 311. We have been hitherto discussing the operation of the pleading rules in limiting and defining the amount of evidence admissible in ordinary actions; but it must be carefully borne in mind, that the numerous class of cases, in which the defendant is expressly empowered to plead "*Not Guilty by statute*," and to give special matter in evidence under such plea, is not affected by these rules further than this, that the party who intends so to plead cannot "plead any other defence to the same cause of action without the leave of the court or a judge."<sup>2</sup> The pleader, too, must "insert in the margin of his pleading the words 'By Statute,' together with the year of the reign in which the Act of Parliament on which he relies, was passed, and also the chapter and section of such Act, and shall specify whether such Act is public or otherwise; otherwise such defence shall be taken not to have been pleaded by virtue of any Act of Parliament."<sup>3</sup> § 293

§ 312. It is extremely difficult to lay down, as an abstract proposition of law, what shall amount to an *acting in pursuance of a statute*, or *in execution of an office*, so as to entitle a defendant to § 294

<sup>1</sup> 6 Moo. P. C. R. 257.

<sup>2</sup> Ord. XIX., R. 12.

<sup>3</sup> Ord. XXI., R. 19.

give special matter in evidence under the general issue, to rely on the want of notice of action,<sup>1</sup> or on the fact that he has tendered amends, or otherwise to claim any particular protection which may be afforded by Act of Parliament; but thus much may be stated with safety, that if a party believes, *bonâ fide*, in the existence of a state of *facts*,<sup>2</sup> which, if they had existed, would have afforded a defence to the action,<sup>3</sup> he is,—without reference to the reasonableness of such belief,<sup>4</sup>—entitled to protection, although he may have proceeded illegally or exceeded his jurisdiction.<sup>5</sup> Statutes of this kind are intended for the protection of honest persons, who *bonâ fide* mean to discharge their duty;<sup>6</sup> and the court will, consequently, so interpret their provisions, as to save harmless all persons who act illegally under the reasonable belief

<sup>1</sup> See *Arnold v. Hamel*, 9 Ex. R. 404; *Kirby v. Simpson*, 23 L. J., M. C. 165; 10 Ex. R. 358, S. C. In this last case it was held that a magistrate acting in execution of his office is entitled by 11 & 12 V., c. 44, § 9, to notice of action, although he acts maliciously and without reasonable and probable cause.

<sup>2</sup> If there are no facts on which a *bonâ fide* belief can reasonably be founded, the protection will not apply, *Agnew v. Jobson*, 13 Cox, 625; 47 L. J., M. C. 67, S. C.

<sup>3</sup> *Hermann v. Seneschal*, 32 L. J., C. P. 43; 13 Com. B., N. S. 392, S. C.; *Heath v. Brewer*, 15 Com. B., N. S. 803; *Midl. Ry. Co. v. Withington Local Board*, L. R. 11 Q. B. D. 788, per Ct. of App.; *Roberts v. Orchard*, 2 H. & C. 169, per Ex. Ch.; 33 L. J., Ex. 65, S. C. See *Downing v. Capel*, 36 L. J., M. C. 97; *Selmes v. Judge*, 6 Law Rep., Q. B. 724; 40 L. J., Q. B. 287, S. C. nom. *Judge v. Selmes*.

<sup>4</sup> *Chamberlain v. King*, 6 Law Rep., C. P. 474; S. C. nom. *King v. Chamberlain*, 40 L. J., C. P. 273. Prior to this decision, it was thought by many that the belief to be available, must have rested "on some colour of reason." See *Cann v. Clipperton*, 10 A. & E. 582; *Cook v. Leonard*, 6 B. & C. 351; 9 D. & R. 339, S. C., as qualified by the Ct. of Ex. in *Jones v. Gooday*, 9 M. & W. 743, 745. See, also, *Kine v. Evershed*, 10 Q. B. 143; *Leete v. Hart*, 3 Law Rep., C. P. 322; *Spooner v. Juddow*, 6 Moo. P. C. R. 283, per *Ld. Campbell*; *Booth v. Clive*, 10 Com. B. 827; *Read v. Coker*, 13 Com. B. 850; *Arnold v. Hamel*, 9 Ex. R. 409; *Hermann v. Seneschal*, 32 L. J., C. P. 43; 13 Com. B. N. S. 392, S. C.

<sup>5</sup> *Hazeldine v. Grove*, 3 Q. B. 997, 1006, 1007; 3 G. & D. 210, S. C.; *Spooner v. Juddow*, 6 Moo. P. C. R. 257, 283; *Jones v. Gooday*, 9 M. & W. 736, 743—746, per *Parke* and *Alderson*, B.; *Theobald v. Crichmore*, 1 B. & A. 227, 229, 230, per *Ld. Ellenborough*, and *Bavley*, J. See, further *Eliot v. Allen*, 1 Com. B. 18; *Shatwell v. Hall*, 10 M. & W. 523; 2 Dowl. N. S. 567, S. C.; *Hopkins v. Crowe*, 4 A. & E. 774; *Lidster v. Borrow*, 9 A. & E. 654; *Bush v. Green*, 4 Bing. N. C. 41; *Smith v. Shaw*, 10 B. & C. 277; 5 M. & R. 225, S. C.; *Davis v. Curling*, 8 Q. B. 286; *Cox v. Reid*, 13 Q. B. 558; *Thomas v. Stephenson*, 2 E. & B. 108; *Newton v. Ellis*, 5 E. & B. 115; *Poulsum v. Thirst*, 2 Law Rep., C. P. 449; 36 L. J., C. P. 225, S. C.

<sup>6</sup> Per *Parke*, B., in *Jones v. Gooday*, 9 M. & W. 743.



that they are authorised in what they do by Act of Parliament; and this, too, whether the error complained of has been committed in respect of *time, place, or circumstance*.<sup>1</sup>

§ 313. It is now finally determined that, under the plea of "*Not Guilty by statute*," the defendant may set up any defence that could be specially pleaded, whether it be founded wholly or partly on the statute, or be merely sustainable at common law.<sup>2</sup> Thus, in an action for an excessive distress, such a plea puts in issue, not only the matter of justification, but the tenancy and the ownership of the goods;<sup>3</sup> and if a plaintiff sues as administrator, the defendant, who has thus pleaded, may dispute his title to that character.<sup>4</sup> The natural result of this rule is, that the courts will not, in general, allow the defendant to plead "not guilty by statute" in connexion with any other defence; but if a reasonable doubt exists as to whether the defendant, in regard to the particular act complained of, is entitled to such a plea, the rule will, in favour of substantial justice, be sometimes relaxed.<sup>5</sup>

§ 314. The statutes enabling persons, who act in pursuance thereof, or otherwise in execution of their offices, to plead not guilty, and to give special matter in evidence under such plea, are still extremely numerous, although the effect of modern legislation has been greatly to reduce their number. For instance, by the Act of 5 & 6 V., c. 97, § 3, so much of any clause or provision in any Act commonly called Public local and personal, or Local and personal, or in any Act of a local and personal nature,<sup>6</sup> whereby any party was entitled, before the 10th of

<sup>1</sup> *Hughes v. Buckland*, 15 M. & W. 346, 353, 354, per Pollock, C. B.; *Horn v. Thornborough*, 3 Ex. R. 846; 6 Dowl. & L. 651, S. C.

<sup>2</sup> *Ross v. Clifton*, 11 A. & E. 631; 1 G. & D. 72; 9 Dowl. 1033, S. C.; *Maud v. Monmouth Can. Co.*, C. & Marsh. 606, 608, per Cresswell, J., stating the general opinion of the judges; *Fisher v. Thames Junc. Ry. Co.*, 5 Dowl. 773; *Haine v. Davey*, 4 A. & E. 892; 6 N. & M. 356, S. C.; *Engleton v. Gutteridge*, 11 M. & W. 460, per Parke, B.

<sup>3</sup> *Williams v. Jones*, 11 A. & E. 643.

<sup>4</sup> *Tharpe v. Stallwood*, 5 M. & Gr. 768, per Cresswell, J.

<sup>5</sup> *Langford v. Woods*, 8 Scott, N. R. 369; 7 M. & Gr. 625, S. C.

<sup>6</sup> As to the meaning of this phrase, see *Richards v. Easto*, 15 M. & W. 244;

August, 1842, to give special matter in evidence under the general issue, is repealed. The Irish Common Law Procedure Act of 1853,<sup>1</sup> also repeals, by § 69, "so much of any Act of Parliament as entitles or permits any person to plead the general issue only, and to give special matter in evidence without pleading the same." Unfortunately a similar clause is not to be found in either of the English Common Law Procedure Acts; and the pleader is consequently still left to discover, as best he may, in what cases the defendant may or may not avail himself of this indefinite and comprehensive form of pleading.

§ 315. It is not intended here to furnish a list of the statutes ; 27 which authorise such pleas, but among them will be found the Acts passed in 1861 for consolidating the law relating to larceny, malicious injuries, and coin.<sup>2</sup> In every action, too, which is brought against a *justice* of the peace, "for anything done by him in the *execution of his office*," the defendant,—besides enjoying many other privileges,<sup>3</sup>—is allowed to plead the general issue, and "to give any special matter of defence, excuse, or justification, in evidence under such plea."<sup>4</sup> He may even prove under the general issue, that after notice of action and before the writ was issued, he tendered amends to the plaintiff, or that after the commencement of the suit, and before issue joined, he paid money into court;<sup>5</sup> and this circumstance is here mentioned, because in *Cock v. Gent*, 18 M. & W. 234; *Barnett v. Cox*, 9 Q. B. 617; *Pilkington v. Riley*, 6 Dowl. & L. 628; 3 Ex. R. 739, S. C.; *Shepherd v. Sharp*, 25 L. J., Ex. 254; 1 H. & N. 115, S. C.

<sup>1</sup> 16 & 17 V., c. 113, Ir.

<sup>2</sup> 24 & 25 V., c. 96, § 113; c. 97, § 71; c. 99, § 33. See, also, the Seamen's Clothing Act, 1869, 32 & 33 V., c. 57, § 6.

<sup>3</sup> See 11 & 12 V., c. 44; and *Kirby v. Simpson*, 23 L. J., M. C., 165, cited ante, p. 300, n.<sup>1</sup>.

<sup>4</sup> § 10.

<sup>5</sup> § 11 enacts, that "in every such case after notice of action shall be so given as aforesaid, and before such action shall be commenced, such justice to whom such notice shall be given may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit as amends for the injury complained of in such notice; and after such action shall have been commenced, and at any time before issue joined therein, such defendant, if he have not made such tender, or in addition to such tender, shall be at liberty to pay into court such sum of money as he may think fit, and which said tender and payment of money into court, or either of them, may afterwards be given in evidence by the defendant at the trial under the general issue aforesaid; and if the jury at the trial shall be of opinion that the plaintiff is not entitled to

most of the other statutes,<sup>1</sup> which empower defendants to plead the general issue, and to tender or pay into court amends for the injury complained of, it is expressly enacted that such tender or payment into court shall be specially pleaded.<sup>2</sup>

§ 315A. The general rule of law, which limits proof to the matters put in issue by the pleadings, as stated above in § 298, and which is equally applicable to all actions, has been supplemented, in the case as an action being brought for infringement of a patent, by a more stringent and precise rule; for the recent statute,<sup>3</sup> which consolidates the law relating to patents, has expressly provided, in § 29, as follows:—

“(1.) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the court or the judge, at any subsequent time, particulars of the breaches complained of.

“(2.) The defendant must deliver with his statement of defence, or, by order of the court or a judge, at any subsequent time, particulars of any objections on which he relies in support thereof.

“(3.) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and, if one of those grounds is want of novelty, must state the time and place of the previous publication or user alleged by him.

“(4.) At the hearing no evidence shall, except by leave of the court, be given of damages beyond the sum so tendered or paid into court, or beyond the sums so tendered and paid into court, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuit, and the sum of money, if any, so paid into court, or so much thereof as shall be sufficient to pay or satisfy the defendant's costs in that behalf shall thereupon be paid out of court to him, and the residue, if any, shall be paid to the plaintiff; or if, where money is so paid into court in any such action, the plaintiff shall elect to accept the same in satisfaction of his damages in the said action, he may obtain from any judge of the court in which such action shall be brought an order that such money shall be paid out of court to him, and that the defendant shall pay him his costs to be taxed, and thereupon the said action shall be determined, and such order shall be a bar to any other action for the same cause.”

<sup>1</sup> Not in all. See the County Ct. Acts, 9 & 10 V., c. 95, § 138; & 15 & 16 V., c. 54, § 6. See, also, the Acts of 1861, cited ante, p. 302, n.<sup>2</sup>; and 11 G. 2, c. 19, §§ 20, 21.

<sup>2</sup> 45 & 46 V., c. 50, § 226, subs. 2.

<sup>3</sup> 46 & 47 V., c. 57.

court or a judge, be admitted in proof of any alleged infringement or objection, of which particulars are not so delivered.

"(5.) Particulars delivered may be from time to time amended, by leave of court or a judge.

"(6.) On taxation of costs, regard shall be had to the particulars delivered by the plaintiff and by the defendants; and they respectively shall not be allowed any costs in respect of any particular delivered by them, unless the same is certified by the court or a judge to have been proven, or to have been reasonable and proper, without regard to the general costs of the case."

§ 316. The rule confining evidence to the points in issue, not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the mode of proving even the issues themselves. Thus,<sup>1</sup> it excludes all evidence of *collateral facts*, which are incapable of affording any reasonable presumption as to the principal matters in dispute; and the reason is, that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead; moreover, the adverse party, having had no notice of such evidence, is not prepared to rebut it. The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the judge; so that while he shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble, light on the question in issue. And here it will generally be found that the circumstances of the parties to the suit, and the position in which they stood<sup>2</sup> when the matter in controversy occurred, are proper subjects of evidence; and indeed, the change in the law enabling parties to give testimony for themselves, has rendered this proof of "*surrounding circumstances*," still more important than it was in former times.<sup>3</sup> In accordance with this doctrine it has been properly

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<sup>1</sup> Gr. Ev. § 52, in part for six lines.

<sup>2</sup> See *Woodward v. Buchanan*, 39 L. J., Q. B. 71; 5 Law Rep., Q. B. 265, S. C.

<sup>3</sup> *Dowling v. Dowling*, 10 Ir. Law R., N. S. 244, per Pigot, C. B. (3170)

held, that, in an action for money lent, the poverty of the alleged lender was a very relevant fact, the evidence of which was admissible for the purpose of disproving the loan.<sup>1</sup>

§ 317. The most important class of facts which are excluded § 298A on the ground of *irrelevancy*, comprises the acts and declarations, either of strangers, or of one of the parties to the action in his dealings with strangers. These,—which in the technical language of the law are denominated '*res inter alios actæ*,'—it would be manifestly unjust to admit, since the conduct of one man under certain circumstances, or towards certain individuals, varying as it will necessarily do according to the motives which influence him, the qualities he possesses, and his knowledge of the character of those with whom he is dealing, can never afford a safe criterion by which to judge of the behaviour of another man similarly situated, or of the same man towards other persons.

§ 318. The application and extent of this rule will be best under- § 299 stood by referring to a few of the leading decisions on the subject. In an action of trover brought against the creditor of a bankrupt by the assignees, the goods in dispute were sought to be recovered on the ground that, before they came into the hands of the defendant, acts of bankruptcy had been committed; and the plaintiffs endeavoured to prove these acts by showing the prior delivery of other goods to various creditors, who, after the fiat had issued, had returned them to the assignees; but the court was of opinion that the conduct of these creditors in returning the goods could not affect the title of the defendant. The only way in which their conduct bore upon the case, was by showing their conviction that they had received the goods under circumstances which did not entitle them to keep possession; and as their opinions, expressed after the fiat, could not have been received, evidence of their acts, adduced for the purpose of raising an inference respecting the previous intentions, either of themselves or of the bankrupt, was equally inadmissible.<sup>2</sup> So, proof of the usage of a particular estate, however extensive it may be, is

<sup>1</sup> Dowling v. Dowling, 10 Ir. Law R., N. S. 236.

<sup>2</sup> Backhouse v. Jones, 6 Bing. N. C. 65; 8 Scott, 148, S. C.

inadmissible for the purpose of importing into the lease of a farm on that estate some special stipulations relative to the mode of cultivation.<sup>1</sup> So, where the question between landlord and tenant was, whether the rent was payable quarterly or half-yearly, evidence of the mode in which other tenants of the same landlord paid their rent was rejected;<sup>2</sup> and where it was necessary for a brewer to prove that he had supplied a publican with good beer, other publicans were not allowed to show that, during the same period as the dealing in question, he had furnished them with beer of an excellent quality, for a man may deal well with some of his customers, though not with others.<sup>3</sup>

§ 319. In another case, where the point in issue was whether the plaintiff's scholars were ill-fed, a witness was not allowed to be asked as to the comparative quality of the provisions supplied by the plaintiff, with those consumed in a *particular* school, where the witness was educated, though evidence would be admissible to show the general treatment of boys at schools.<sup>4</sup> Again, in an action of contract against a married woman, where the issue was in part, whether the defendant had represented herself to the plaintiff as a feme sole, and whether he had dealt with her believing her to be such, it was held that evidence of the defendant's dealings with other tradesmen could only be admissible, if at all, on the ground that she had held herself out to them as a single woman, in such a manner as to reach the plaintiff's ears.<sup>5</sup> So, also, in an action brought by the indorsee against the acceptor of a bill, where the defence was that the acceptance was a forgery, evidence that a col

<sup>1</sup> *Womersley v. Dally*, 26 L. J., Ex. 219.

<sup>2</sup> *Carter v. Pryke*, Pea. R. 95, per *Ld. Kenyon*.

<sup>3</sup> *Holcombe v. Hewson*, 2 Camp. 391, per *Ld. Ellenborough*. See, also, *Hollingham v. Head*, 27 L. J., C. P. 241; 4 Com. B., N. S. 388, S. C.; *Rew v. Hutchins*, 10 Com. B., N. S. 829; *Howard v. Sheward*, 36 L. J., C. P. 42; 2 Law Rep., C. P. 148, S. C.

<sup>4</sup> *Boldron v. Widdows*, 1 C. & P. 65, per *Abbott, C. J.*

<sup>5</sup> *Barden v. Keverberg*, 2 M. & W. 61. See *Smith v. Wilkins*, 6 C. & P. 180, where, the question being whether credit was given to defendant's wife or to her father, evidence that other tradesmen had given credit to the father was properly rejected by *Tindal, C. J.* Also *Delamotte v. Lane*, 9 C. & P. 261.

lection of bills, on which the defendant's acceptance was forged, had been in the plaintiff's possession, and that some of them had been circulated by him, was rejected, as no distinct proof was given that the bill in question had *ever formed part of that collection*.<sup>1</sup>

§ 320. These last words deserve special notice, since they point out an *exception* to the rule under discussion, in favour of the admissibility of facts which, though collateral, are proved to be *connected* by some general link with the matter in issue. This exception has been recognised in numerous cases. Thus, no rule is better established, or more frequently acted upon, than that which precludes the *customs* of one *manor* from being given in evidence to prove the customs of another; because, as each manor may have customs peculiar to itself, to admit the peculiar customs of another manor in order to show the customs of the manor in question, would be a very false guide for the purpose of leading to any sound conclusion, and would, in fact, put an end to all question as to the peculiar customs in particular manors, by throwing them open to the customs of all surrounding manors.<sup>2</sup> Still, such customs become evidence the moment that a foundation has been laid for their admission, by clear proof of a sufficient connexion between the two manors. The mere fact, indeed, that the two lie within the same parish and leet, will not be sufficient; nor even that the one was a sub-infeudation of the other; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs.<sup>3</sup> If, however, it can be satisfactorily proved that the customs in the two manors are identical, or that the one was derived from the other after the time of Richard the First, then the customs of each will respectively become evidence;<sup>4</sup> and so, also, if the custom in

<sup>1</sup> Griffiths v. Payne, 11 A. & E. 131; 3 P. & D. 107, S. C.; Thompson v. Mosely, 5 C. & P. 502, per Ld. Lyndhurst; Viney v. Barss, Esp. 293, per Ld. Kenyon; Balcetti v. Serani, Pea. R. 142, per Buller, J. Such evidence would be clearly inadmissible in an indictment for forgery, per Ld. Denman, 11 A. & E. 133.

<sup>2</sup> M. of Anglesey v. Ld. Hatherton, 10 M. & W. 235, per Ld. Abinger; Furneaux v. Hutchins, 2 Cowp. 807; Doe v. Sisson, 12 East, 62.

<sup>3</sup> M. of Anglesey v. Ld. Hatherton, 10 M. & W. 218.

<sup>4</sup> Id. 242, 243, per Alderson, B.

question be a particular incident of the general tenure which is proved to be common to the two manors, evidence may be given of what the custom of the one is as to that tenure, for the purpose of showing what is the custom of the other as to the same.<sup>1</sup> For instance, prove in a particular manor that borough English or gavelkind prevails, and then you may see from other manors what are the peculiarities of these tenures.<sup>2</sup>

§ 321. The manors on the border between England and Scotland,<sup>3</sup> and those in the mining districts of Derbyshire and Cornwall, will furnish other examples of the application of this rule; since, throughout the former, a particular species of tenure, called tenant-right, and in the latter, particular customs, as to the rights of the miners and the rights to the minerals, prevail; and consequently, if in one of the manors no example can be adduced of what is the custom in any particular case, it is only reasonable that, in order to explain the nature of the tenure or right in question, which is not confined to a single manor, but prevails equally in a great number, evidence should be admissible to show what is the general usage with respect to that tenure or right.<sup>4</sup> Thus, where in each of several manors belonging to the same lord, and forming part of the same district, a particular class of tenants called *assessional* tenants held the farms, to whom their tenements were granted by similar words, evidence of the rights enjoyed by those tenants in one manor was received, to show the extent of their rights in another.<sup>5</sup> This last case, indeed, raised no question as to *manorial* title; for had there been no manor at all, precisely the same evidence would have been admissible, provided the land had been all held under the *assessional* tenure.<sup>6</sup>

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<sup>1</sup> *M. of Anglesey v. Ld. Hatherton*, 10 M. & M. 242, 243, per Alderson, B.; *Stanley v. White*, 14 East, 338, 341, 342, per Ld. Ellenborough; *R. v. Ellis*, 1 M. & Sel. 662, per id.; *D. of Somerset v. France*; 1 Str. 662; *Champion v. Atkinson*, 3 Keb. 90; explained by Rolfe, B., in 10 M. & W. 246, 247.

<sup>2</sup> *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 246, per Rolfe, B.

<sup>3</sup> *Rowe v. Parker*, 5 T. R. 31, per Ld. Kenyon.

<sup>4</sup> *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 237, per Ld. Abinger.

<sup>5</sup> *Rowe v. Brenton*, 8 B. & C. 758; 3 M. & R. 361, S. C.

<sup>6</sup> Per Ld. Abinger, in *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 237, 238.



§ 322. Again, upon a question whether the Crown, in right of the Duchy of Lancaster, had the exclusive privilege, under the original charter granted to Henry Duke of Lancaster in the year 1349, of appointing a coroner within the honour of Pontefract, evidence of appointments of coroners, and of their acting, in other parts of the duchy, out of the honour of Pontefract, was held admissible.<sup>1</sup> On the same principle, the mode of conducting a particular branch of trade in one place has been proved, by showing the manner in which the same trade is carried on in another place;<sup>2</sup> and where the dispute at the trial was as to the exact line of boundary between the manors of Wakefield and Rochdale which the plaintiff contended was the ridge of a mountain, whence the waters descended in opposite directions, he was allowed to prove, in support of this view, that the ridge of the *same range* of hills separated the manor of Rochdale from another manor which adjoined the manor of Wakefield; because, this being *natural* boundary, which was equally suitable in both cases, it was highly improbable that it should have been varied.<sup>3</sup>

§ 323. In like manner it has been held,—upon a question whether a slip of waste land, lying between the highway and the enclosed lands of the plaintiff, belonged to him, or to the lord of the manor,—that the lord might give evidence of acts of ownership on other parts of the waste land between the *same* road and the enclosures of other persons, although at the distance of two miles from the spot in dispute, and although the continuity of the waste was interrupted for the space of some sixty or seventy yards, by the intervention of a bridge and some old houses.<sup>4</sup> So, where, in trespass, the object of the plaintiff was to prove himself the owner of the entire bed of a river flowing between his land and that of the defendant, and thus to rebut the presumption that each party was entitled *ad medium*

<sup>1</sup> *Jewison v. Dyson*, 9 M. & W. 540. See *Fleet v. Murton*, 41 L. J., Q. B. 49.

<sup>2</sup> *Noble v. Kennoway*, 2 Doug. 510.

<sup>3</sup> *Brisco v. Lomax*, 8 A. & E. 196; 3 N. & P. 388, S. C.

<sup>4</sup> *Doe v. Kemp*, 7 Bing. 332; 2 Bing. N. C. 102; 2 Scott, 9, S. C. recognised by Parke, B., in *Jones v. Williams*, 2 M. & W. 327, 328; *Bryan v. Winwood*, 1 Taunt. 206; *Dendy v. Simpson*, 18 Com. B. 831.

flum aquæ,<sup>1</sup> he was allowed to give in evidence acts of ownership exercised by himself upon the bed and banks of the river on the defendant's side, lower down the stream, where it flowed between the plaintiff's land and the farm of a third party, adjoining the defendant's property; as also repairs which he had done, beyond the limits of the defendant's land, to a fence which, dividing that and other land from the river, ran along the side of the stream for a considerable distance, till it came opposite to the extremity of the plaintiff's property on the other side.<sup>2</sup>

<sup>1</sup> Ante, § 119.

<sup>2</sup> Jones v. Williams, 2 M. & W. 326. The observations of Parke, B., in this case are so pertinent, that no apology is necessary for introducing them here at length. "I am also of opinion that this case ought to go down to a new trial, because I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and, consequently, the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the jury, that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same enclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person; though it by no means follows as a necessary consequence, for different persons may have balks of land in the same enclosure; but this is a fact to be submitted to the jury. So, I apprehend, the same rule is applicable to a wood which is not enclosed by any fence: if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary surrounding the whole; and the case of *Stanley v. White*, 14 East, 332, I conceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person, by showing acts of ownership on his part along the same fence. It has been said in the course of the argument, that the defendant had no interest to dispute the acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party: they are admissible of themselves *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less

§ 324. The same principle applies with increased force to the case of mines, because it is not possible that the lessees of minerals, lying under an extensive district, can enter upon, and take actual possession of, every part of that which forms the subject of demise; and, moreover, the mode of occupying a mine cannot afford the same evidence of possession as the occupation of the surface, the produce of which is from time to time consumed and renewed. When one is taken, it is gone for ever. Evidence, therefore, of working under one part of the surface is, under a demise of all mines and minerals lying beneath a large continuous tract of waste land, evidence of possession of the entire subject of demise.<sup>1</sup> § 304

§ 325. In these, and the like cases, it is for the judge to decide,<sup>2</sup> whether such an unity of character exists between the spot in dispute and the parcel of land over which acts of ownership have been exercised, as to lead to the fair inference that both are subject to the same rights, and constitute in fact but parts of an entire property. If no such inference can be raised, evidence of acts done beyond the limits of the locus in quo will be inadmissible. Thus, where it was attempted to connect parcels of waste land with each other, merely by showing that they all lay within the same manor, and between enclosures and public roads, it was held that evidence of acts of ownership over some of these lands was inadmissible to prove title to the others.<sup>3</sup> § 305

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*weight.* That observation applies only to the effect of the evidence. Applying that reasoning to the present case, surely the plaintiff, who claims the whole bed of the river, is entitled to show the taking of stones, not only on the spot in question, but all along the bed of the river, which he claims as being his property; and he has a right to have that submitted to the jury. The same observation applies to the fence and the banks of the river. What weight the jury may attach to it is another question. The principle is the same as that which is laid down in *Doe v. Kemp*.—pp. 331, 332. See, also, *R. v. Brightside*, *Bierlow*, 13 Q. B. 933; *Peardon v. Underhill*, 16 Q. B. 120; *Donegall v. Templemore*, 9 Ir. Law Rep., N. S. 374, 406, per Christian, J.; and *In re Belfast Dock Act*, I. R., 1 Eq. 128, 142.

<sup>1</sup> *Taylor v. Parry*, 1 M. & Gr. 604, 615, per Tindal, C. J., 1 Scott, N. R. 576, S. C.

<sup>2</sup> *Doe v. Kemp*, 7 Bing. 336, per Bosanquet, J.; ante, § 24.

<sup>3</sup> *Doe v. Kemp*, 2 Bing. N. C. 102. *Id.* Denman, in giving judgment, observes, "If the lord has a right to one piece of waste land, it affords no infer-

§ 326. This rule, limited in the manner above stated, is founded on common sense and common justice, and applies with even greater force to *criminal* than to civil proceedings; for, as one of the chief objects of an indictment is to afford distinct information to the prisoner of the specific charge which is about to be brought against him, the admission of any evidence of facts unconnected with that charge, would be clearly open to the serious objection of taking the prisoner by surprise. No man should be bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best of men would choose to submit to such an ordeal.<sup>1</sup> If, therefore, on an indictment for burglariously entering a house on a certain day and stealing goods therein, the prosecutor fail in proving that any larceny was on that occasion committed, he cannot abandon the charge of burglary, and then proceed to show that the prisoner stole some of the articles mentioned in the indictment on a previous occasion; because, though time is not usually a material allegation, yet the prisoner, having been led to suppose that he was to meet a charge of burglary, cannot be expected to come prepared to prove his innocence with respect to a distinct offence, committed, if at all, at a totally different time.<sup>2</sup> So, an admission by the prisoner, that he has, at another time, committed an offence similar to that with which he is charged, and that he has a tendency to perpetrate such crimes, cannot be

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ence, even the most remote, that he has a right to another, in the same manor, although both may be similarly situated with respect to the highway; assuming that all were originally the property of the same person, as the lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands, that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to private individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with respect to those parcels, which from their local situation may be deemed parts of one waste or common; acts of ownership in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common."—pp. 107, 108. See, also, *Tyrwhitt v. Wynne*, 2 B. & A. 554; *Hollis v. Goldfinch*, 1 B. & C. 218, 219, per Bayley, J.

<sup>1</sup> Fost., C. L. 246.

<sup>2</sup> *R. v. Vandercomb*, 2 Lea. 708; 2 East, P. C. 519, S. C.

received;<sup>1</sup> and, in treason, no overt act amounting to a distinct independent charge, though falling under the same head of treason, can be given in evidence, unless it be either expressly laid in the indictment, or be direct proof of any of the overt acts which are laid.<sup>2</sup> Thus, on an indictment for adhering to the King's enemies on the high sea, where the overt act laid was the prisoner's cruising on the King's subjects in a vessel called the *Loyal Clencarty*, evidence that he had some time before cut away the custom-house barge, and gone a cruising in her, was rejected.<sup>3</sup>

§ 327. But when felonies are so connected together as to form part of one entire transaction, evidence of one may be given to show the character of the other.<sup>4</sup> Thus, where the lessee of a coal-mine had run levels from his own shaft into his neighbours' mines, and had, during a period of four years, been constantly extracting coal belonging to thirty different proprietors, an indictment charging him in one and the same count with stealing the coal of each of these proprietors was held to be valid; and although the judge, in summing up, advised the jury to confine their attention to one particular charge, he refused to make the prosecutor elect on which case he would rely, but allowed him to give evidence in support of all the charges, as at least furnishing proof of a felonious intent.<sup>5</sup> So, where a shopboy was indicted for robbing his mistress of six shillings, and it was proved that on one occasion, when the till contained some marked silver and other money amounting in all to 12s. 6d. the prisoner went to it, and it was afterwards found to contain 11s. 6d. only, the prosecutrix was allowed to show that, on subsequent examinations of the till, the money was perceived to have gradually diminished,

<sup>1</sup> *R. v. Cole*, 1 Ph. Ev. 477, by all the judges.

<sup>2</sup> 7 W. 3, c. 3, § 8, as explained in *Fost.*, C. L. 245; citing *Ambrose Rookwood's case*, 13 How. St. Tr. 139; *Lowick's case*, id. 267; *Layer's case*, 16 id. 93; *Deacon's case*, 18 id. 365; *Fost.*, C. L. 9, S. C.; and *Wedderburne's case*, 18 id. 425; *Fost.*, C. L. 22, S. C.

<sup>3</sup> *Vaughan's case*, 13 How. St. Tr. 485; *Fost.*, C. L. 246.

<sup>4</sup> *R. v. Ellis*, 6 B. & C. 147, 148, per Bayley, J.; *Roupell v. Haws*, 3 Fost. & Fin. 784; *R. v. Rearden*, 4 Fost. & Fin. 76, per Willes, J.

<sup>5</sup> *R. v. Bleasdale*, 2 C. & Kir. 765, per Erle, J. See *R. v. Firth*, 38 L. J., M. C. 54, where the prisoner was indicted for stealing gas; 11 Cox, 234, S. C.; *R. v. Henwood*, 11 Cox, 526.

and that, on the prisoner being searched 8s. of the marked money was found on his person; for though each taking was a separate felony, they were all so connected together as mutually to illustrate and prove each other.<sup>1</sup>

§ 328. So, where four indictments were found against a woman, § 307 which respectively charged her with poisoning her husband and two of her sons, and with attempting to poison a third son, evidence was tendered on the trial of the first indictment, that arsenic had been taken by the three sons a few months after their father's death; that all the four parties, when taken ill, exhibited the same symptoms; and that the woman, who had lived in the same house with her husband and children, had been in the habit of preparing their meals. It was objected, on behalf of the prisoner, that the facts proposed to be proved took place subsequently to the death of the husband, and were, moreover, calculated to create a suspicion that the prisoner had committed three other felonies; but the court held that the evidence was clearly admissible, for the purposes of proving, first, that the husband died of arsenic, and next, that his death had not been accidental.<sup>2</sup> So, where a man committed three burglaries in one night, and left at one of the houses property taken from another, the three felonies were considered so connected, that the court heard the history of them all;<sup>3</sup> and the same course was adopted, where the prisoner was charged on three indictments with firing three stacks belonging to separate parties, and it appeared that the stacks, being within sight of each other, were fired about the same time.<sup>4</sup>

<sup>1</sup> R. v. Ellis, 6 B. & C. 145.

<sup>2</sup> R. v. Geering, 18 L. J., M. C. 215, per Pollock, C. B., after consulting Alderson, B., and Talfourd, J.; R. v. Garner, 3 Fost. and Fin. 681, per Willea, J., & Pollock, C. B.; S. C. more fully reported, 4 Fost. & Fin. 346; R. v. Cotton, 12 Cox, 400, per Archibald, J., & Pollock, B.; R. v. Roden, id. 630, per Lush, J.; R. v. Hepsom, 14 Cox, 40, per id. See post, § 340. But see R. v. Winslow, 8 Cox, 397, per Martin & Wilde, Bs. See R. Flannagan, 15 Cox, 463, per Butt, J.

<sup>3</sup> Cited by Ld. Ellenborough in R. v. Wylie, 1 N. R. 94; 2 Lea. 965, S. C.; R. v. Stonyer, 2 Russ., C. & M. 775, per Wightman, J. See, also, Alison, Cr. L. 313, 314, and Wills, Cir. Ev. 58—60, for remarkable cases of a similar nature which occurred in Scotland.

<sup>4</sup> R. v. Long, 6 C. & P. 179, per Gurney, B., R. v. Cobden, 3 Fost. & Fin. 833, per Bramwell, B.

§ 329. In immediate connexion with this subject, though not strictly a question of evidence, may be noticed the *doctrine of election*. In point of law, no objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind.<sup>1</sup> Indeed, on the face of the record, every count purports to be for a separate offence,<sup>2</sup> and in misdemeanors it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment.<sup>3</sup> In cases of felony, however, this rule has, from motives of humanity, been considerably modified; for as an indictment containing several distinct charges is calculated to embarrass a prisoner in his defence, the judges in the exercise of a sound discretion, are accustomed to quash indictments so framed, when it appears, before the prisoner has pleaded and the jury are charged, that the inquiry is to include separate crimes. When this circumstance is discovered during the progress of the trial, the prosecutor is usually called upon to elect one felony, and to confine himself to that,<sup>4</sup> unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction. Here such a course will not be pursued, as its adoption would defeat the ends of justice.<sup>5</sup> § 309

§ 330. Thus, if a prisoner is charged with receiving several articles, knowing them to have been stolen, and it be proved that they were received at separate times, the prosecutor may be put to his election, but if it be possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of the accusation.<sup>6</sup> So, where several prisoners were charged in § 309

<sup>1</sup> *R. v. Kingston*, 8 East, 41; *R. v. Jones*, 2 Camp. 132, per Ld. Ellenborough. As to election in civil cases, see *Howard v. Newton*, 2 M. & Rob. 509.

<sup>2</sup> *Young v. R.*, 3 T. R. 106, per Buller, J.; 1 Lea. 511, S. C.

<sup>3</sup> *R. v. Jones*, 2 Camp. 132, per Ld. Ellenborough; *R. v. Levy*, 2 Stark. R. 458. See, also, *R. v. Finacane*, 5 C. & P. 551; *R. v. Collier*, id. 160. But see *R. v. Barry*, 4 Fost. & Fin. 392, per Martin, B.

<sup>4</sup> *R. v. Ward*, 10 Cox, 42, per Byles, J. That was an indictment with three counts for sending three threatening letters. Held, that prosecutor must elect to proceed on one count.

<sup>5</sup> *Young v. R.*, 3 T. R. 106, per Buller, J.; *R. v. Levy*, 2 Stark. R. 458; *R. v. Birdseye*, 4 C. & P. 386. See, also, *Anon.*, Ir. Cir. Rep. 165, 167, n. a.

<sup>6</sup> *R. v. Dunn*, 1 Moo. C. C. 146; *R. v. Hinley*, 2 M. & Rob. 524, per Maule, J.

different counts of the same indictment with committing successive rapes upon the prosecutrix, and aiding each other in turn, she was not put to her election, but the court heard the history of the whole transaction;<sup>1</sup> and a similar course was adopted, where an indictment contained five counts for setting fire to five houses belonging to different owners, and it appeared that the houses were in a row, and that one fire burnt them all.<sup>2</sup> So, where an indictment, in the same count, charged four prisoners with assaulting and robbing two persons, who, it appeared, were walking together at the time when they were attacked, Chief Justice Tindal refused to put the prosecutors to elect upon which felony they would rely, and evidence being given as to the entire transaction, the prisoners were convicted.<sup>3</sup> In another case the defendant was charged in a single count with uttering *twenty-two* forged receipts, which were severally set out and purported to be signed by different persons, with intent to defraud the Crown. His counsel contended that the prosecutor ought to elect upon which of these receipts he would proceed, as, amidst such a variety, it would be almost impossible for the prisoner to conduct his defence. As, however, the indictment alleged that they were all uttered at one and the same time, and the proof corresponded with this allegation, the court refused to interfere, and all the judges subsequently held that a proper discretion had been exercised.<sup>4</sup>

§ 831. In the case of embezzlement by clerks, servants, and persons employed in the public service, or in the police, the Legislature has expressly provided that distinct acts, not exceeding three, may be charged in one indictment, if they have been committed against the same master, and within the period of six calendar months from the first to the last of such acts;<sup>5</sup> this exception being suggested by the difficulty which was felt in procuring a conviction,

<sup>1</sup> *R. v. Folkes*, 1 Moo. C. C. 354; *R. v. Gray*, 7 C. & P. 164; *R. v. Parry*, id. 836.

<sup>2</sup> *R. v. Trueman*, 8 C. & P. 727.

<sup>3</sup> *R. v. Giddins*, C. & Marsh. 634.

<sup>4</sup> *R. v. Thomas*, 2 Lea, 877; 2 East, P. C. 934, S. C.

<sup>5</sup> 24 & 25 V., c. 96, § 71. See *R. v. Balls*, 40 L. J., M. C. 148; 1 Law Rep., C. C. 328; & 12 Cox, 96, S. C.



where the inquiry was confined to one offence. Still, if the prosecutor, disregarding the statute, indict his servant for a single act of embezzlement, he must confine his evidence to that alone, and, if it appear that the prisoner received different sums on different days, and made a false account respecting each sum separately, he must elect one sum and one day on which to proceed.<sup>1</sup>

§ 332. In the case of larceny the doctrine of election has been § 311 still further limited; for not only may several counts be inserted in the same indictment for distinct acts of stealing, not exceeding three, which may have been committed by the prisoner against the same person within the space of six calendar months;<sup>2</sup> but if, upon the trial of any indictment for larceny, the property alleged to have been stolen at one time shall turn out to have been taken at different times, the prosecutor shall not be put to his election, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings.<sup>3</sup> In either of these last events the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as have occurred within six months of each other.<sup>4</sup>

§ 333. Another salutary exception to the rule of election is recog- § 312 nised with respect to receivers of stolen goods;<sup>5</sup> and, provided the inquiry relate to a single criminal act, one or more counts for feloniously sealing property may now be always joined in the same

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<sup>1</sup> *R. v. Williams*, 6 C. & P. 626.

<sup>2</sup> 24 & 25 V., c. 96, § 5.

<sup>3</sup> *Id.* § 6.

<sup>4</sup> *Id.*

<sup>5</sup> 24 & 25 V., c. 96, § 92, enacts, that "in any indictment containing a charge of feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same, or any part or parts thereof, knowing the same to have been stolen; and in any indictment for feloniously receiving any property, knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury, who shall try the same, to find all or

indictment with one or more counts, charging the felonious receipt of the same property by the prisoner, he well knowing it to have been stolen.<sup>1</sup>

§ 334. The *time* for putting the prosecutor to his election is, when it shall appear by the *evidence* that the two or more supposed occurrences took place at different periods, and it is not sufficient for this purpose that the counsel for the Crown, in his opening address, has stated that the fact was so, because the witnesses, on being examined, may put the matter in a different light.<sup>2</sup>

§ 335. Upon the same principle, that collateral facts are only excluded, when they cannot raise any fair inference respecting the matter in issue, evidence of other offences committed by the prisoner is sometimes admitted, with the view either of establishing his *identity*, or of *corroborating* the testimony of a witness in some material particular. Thus, on an information for a libel, where the printer swore that he had received the manuscript from the defendant, and had returned it to him, and notice had been given to the defendant to produce it, other libels written by him concerning the same subject were received by Lord Kenyon, as evidence to corroborate the statement of the printer.<sup>3</sup> So, where the prisoner was charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of a similiar, but ineffectual, attempt on the following evening, when the prisoner brought the duplicate pawn-ticket for the coat, and which ticket was found on his person at the time of his apprehension, was held admissible, as confirmatory of the truth of the prosecutor's evidence respecting what occurred on the former day.<sup>4</sup> So, on a charge of highway robbery, the prosecutor was allowed to rebut an alibi, by proving

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any of the said persons guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen."

<sup>1</sup> R. v. Beeton, 1 Den. 414; 2 C. & Kir. 960, S. C. See R. v. Hughes, 29 L. J., M. C. 71.

<sup>2</sup> R. v. Smart, Ir. Cir. Rep. 15, per Bushe, C. J.

<sup>3</sup> R. v. Pearce, Pea. R. 75.

<sup>4</sup> R. v. Egerton, R. & R. 375, cited by Holroyd, J., in R. v. Ellis, 6 B. & C. 148 (3184)

that, shortly before the attack made upon him, and near the same spot, the prisoner had robbed another person ;<sup>1</sup> and even had no such defence been set up, similar evidence would, it seems, have been admissible, as showing at least that the prisoner was in the neighbourhood at the time when the crime was committed.<sup>2</sup>

§ 336. In civil causes, too, evidence of collateral facts is sometimes received for the purpose of confirming the testimony of witnesses. For instance, where a party was sued on a bill of exchange, which had been accepted in his name by another person, and evidence had been given that this person had a general authority from the defendant to accept bills in his name, the court held that an admission by the defendant of his liability on another bill so accepted, was receivable in evidence, in order to confirm the witness who had spoken to the general authority.<sup>3</sup> § 315

§ 337. Another exception to the rule excluding evidence of collateral facts is recognised, where the question is a *matter of science*, and where the facts proved, though not directly in issue, tend to *illustrate the opinions* of scientific witnesses. Thus, where the point in dispute was, whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time as the harbour in question, was admitted, as such evidence served to elucidate the reasoning of the skilled witnesses.<sup>4</sup> So, if the point in dispute were whether the defendant was or was not on a certain occasion in his right mind, it is clear that, after proof given by a medical man, or admission made by counsel, that madness was often of an hereditary character, evidence tending to show that none of the defendant's ancestors or near relations had been insane, would be admis- § 316

<sup>1</sup> *R. v. Briggs*, 2 M. & Rob. 199, per Alderson, B.

<sup>2</sup> *R. v. Rooney*, 7 C. & P. 517, per Littledale, J. See, also, *R. v. Fursey*, 6 C. & P. 81, per Parke & Gaselee, Jse.

<sup>3</sup> *Llewellyn v. Winckworth*, 13 M. & W. 598. See *Hollingham v. Head*, 27 L. J., C. P. 241; 4 Com. B., N. S. 388, S. C.; *Morris v. Bethell*, 4 Law Rep., C. P. 785; 38 L. J., C. P. 377, S. C.; 5 Law Rep., C. P. 47, S. C.

<sup>4</sup> *Folkes v. Chadd*, 3 Doug. 157; *M'Fadden v. Murdock*, 1 R., 1 C. L. 211.

sible in support of the negative proposition. So, on a question of disputed paternity, once prove as a matter of science that children are apt to inherit the features or general appearance of their parents, and then, as a matter of course, evidence will be received of personal resemblance between the party in question and his alleged father.<sup>1</sup>

§ 338. In some cases evidence has been received of facts which § 317 happened before or after the principal transaction, and which had no direct or apparent connexion with it; and, consequently, their admission might seem, at first view, to constitute another exception to this rule. But in these cases, the *knowledge* or *good faith*, or *intent* of the party was a material fact, on which the evidence, apparently collateral, and foreign to the main subject, had a direct bearing. The admission, therefore, of such evidence, instead of being an exception to the rule, falls strictly within it. Thus, where the question was, whether the acceptor of a bill of exchange either knew that the name of the payee was fictitious, or else had given to the drawer a general authority to draw bills on him payable to fictitious persons, evidence was admitted to show that he had accepted other bills, drawn in like manner, before it was possible to have transmitted them from the place at which they bore date.<sup>2</sup> So, in an action for an assault and consequent injury, where evidence for the defence was given that the plaintiff had ascribed her injury to a previous accident, she was allowed to show that in fact no such accident had ever occurred.<sup>3</sup> So, in any trial, evidence will be admissible to prove or disprove any attempt at subornation of witnesses.<sup>4</sup>

§ 339. So, in an action for fraudulently representing that a trader § 317 was trustworthy, whereby the plaintiff was induced to sell him goods, and thus lost the price of them, the court permitted the defendant to call fellow-townsmen of the trader to state, that, at the time when the representation was made, the man was, according to their belief, in good credit.<sup>5</sup> So, in an action for work and labour in fixing

<sup>1</sup> Bagot v. Bagot, 1 L. R., Ir. 308.

<sup>2</sup> Gibson v. Hunter, 2 H. Bl. 288.

<sup>3</sup> Melhuish v. Collier, 15 Q. B. 878.

<sup>4</sup> Id.

<sup>5</sup> Sheen v. Bumpstead, 1 H. & C. 358; affd. in Ex. Ch., 2 New R. 370; 2 H. & C. 193; 32 L. J., Ex. 271, S. C.

railings to certain houses belonging to the defendant, where the defence was that the plaintiff had given credit to a third person by whom the houses were built under a contract, the builder was allowed to state that the order was given by him on his own account, and not as agent for the defendant; and that the defendant had actually paid him for the building of the houses, including the charge for the railings. This evidence of payment was objected to, but the court held that it was clearly admissible, as tending to show the bona fides of the defence.<sup>1</sup> In another case, where a plaintiff sought to set aside a contract on the ground of his having been insane when it was made, the court held, upon an issue as to whether or not the defendant was at the time aware of the insanity, that evidence of the plaintiff's conduct, at different times both before and after the date of the contract, was admissible, for the purpose of showing that the madness was of such a character as must have been apparent to any one, who had had opportunities of observation like those afforded to the defendant.<sup>2</sup>

§ 340. Again, in an action against a company to recover a sum of money which the plaintiff had paid them in consequence of a *fraud* § 318 alleged to have been committed by their agent with their knowledge and for their benefit, evidence of similar frauds perpetrated on other persons by the same agent with the knowledge and for the benefit of the defendants, was held to be admissible in proof of fraudulent complicity in the case before the Court.<sup>3</sup> So, in actions for false representation, where the question turns on *fraudulent intent*, other mis-statements besides those laid in the statement of claim will be admissible in evidence, for the purpose of showing that the defendant was actuated by dishonest motives.<sup>4</sup> So, in the Divorce Division, in a suit for dissolution of marriage, evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, will be admissible, for the purpose of shewing the character

<sup>1</sup> Gerish v. Chartier, 1 Com. B. 13.

<sup>2</sup> Beavan v. M'Donnell, 23 L. J., Ex. 326; 10 Ex. R. 184, S. C.

<sup>3</sup> Blake v. Albion Life Ass. Co., L. R., 4 C. P. D. 94; 48 L. J., C. P. 169; & 14 Cox, 246, S. C. See ante, § 328.

<sup>4</sup> Huntingford v. Massey, 1 Fost. & Fin. 690, per Crompton, J.

of previous acts of improper familiarity.<sup>1</sup> So, in actions for malicious arrest, the jury are always at liberty to draw an inference of malice *ex antecedentibus et consequentibus*.<sup>2</sup> In actions, too, for defamation, other words written or spoken by the defendant, either before,<sup>3</sup> or after, those declared upon, or even after issue joined,<sup>4</sup> are admissible as evidence of *actual malice* or of *deliberate publication*,<sup>5</sup> and for this purpose it makes in general no difference, whether the language on which the action is founded be equivocal or clear,<sup>6</sup>—whether the collateral words tendered in evidence be addressed to the same party, to whom the slander is alleged in the statement of claim to have been spoken, or to a stranger,<sup>7</sup>—or whether those words be themselves actionable or not.<sup>8</sup>

<sup>1</sup> *Boddy v. Boddy*, 30 L. J., Pr. & Mat. 23.

<sup>2</sup> *Spencer v. Thompson*, 6 Ir. Law R., N. S. 537, 571.

<sup>3</sup> *Long v. Barrett*, 7 Ir. Law R. 439; *Barrett v. Long*, 8 Ir. Law R. 331; 3 H. of L. Cas. 395, S. C. as affd. in Ex. Ch. and Dom. Proc. That was an action of libel, and the plaintiff, to show the animus of the defendant, tendered in evidence other libels published by him against the plaintiff six years before. These were held to be admissible, the jury having been cautioned not to give damages respecting them. Moreover, the omission to give such caution will not amount to misdirection, *Darby v. Ouseley*, 1 H. & N. 1.

<sup>4</sup> *Pearson v. Le Maitre*, 6 Scott, N. R. 607; 5 M. & Gr. 700, S. C. In that case a letter was admitted, written subsequently to the commencement of the action, and fourteen months after the libel complained of. See, also, *Macleod v. Wakley*, 3 C. & P. 311, where the paragraph admitted by Ld. Tenterden was published only two days before the trial; and *Plunkett v. Cobbett*, 5 Esp. 136, where, the defendant being the editor of a weekly periodical, proof that a copy of the paper containing the libel was sold after action brought, was admitted by Ld. Ellenborough as evidence of deliberate publication.

<sup>5</sup> *Pearson v. Le Maitre*, 6 Scott, N. R. 607; 5 M. & Gr. 700, S. C.; *Barwell v. Adkins*, 1 M. & Gr. 807; 2 Scott, N. R. 11, S. C.; *Perkins v. Vaughan*, 4 M. & Gr. 988; *Hemmings v. Gasson*, 1 E. B. & E. 346; *Rustell v. Macquister*, 1 Camp. 49, n., per Ld. Ellenborough; *Charlter v. Barret*, Pea. R. 22, per Ld. Kenyon; *Lee v. Huson*, id. 166, per id.; *Scott v. Ld. Oxford*, id. 3rd ed. 170, n. a, per Lawrence, J.; B. N. P. 7; *Delegal v. Highley*, 8 C. & P. 444, per Tindal, C. J.; *Jackson v. Adams*, 2 Scott, 599.

<sup>6</sup> See n. 8, below.

<sup>7</sup> *Pearson v. Lemaitre*, 6 Scott, N. R. 607; 5 M. & Gr. 700, S. C.; *Mead v. Daubigny*, Pea. R. 125, per Ld. Kenyon.

<sup>8</sup> *Pearson v. Lemaitre*, 6 Scott, N. R. 607; 5 M. & Gr. 700, S. C.; questioning *Pearce v. Ornsby*, 1 M. & Rob. 455, and *Symmons v. Blake*, id. 477. Tindal, C. J., in pronouncing the judgment of the court, states the correct rule to be, "That either party may, with a view to damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose establishes another cause of action, the jury shall be cautioned against giving any damages

§ 341. The case of *Warwick v. Foulkes*<sup>1</sup> will illustrate this doctrine. That was an action of trespass for false imprisonment, to which the defendant pleaded first, not guilty, and secondly, a justification, alleging that the plaintiff had committed a felony. This last plea was abandoned and apologised for at the trial; but the court held that, in estimating the damages under the first issue, the jury might take into account the fact of a jurisdiction having been pleaded, because the placing such a plea on the record was a persisting in the charge, which, under the circumstances, was strong evidence of malice. So, where on the trial of an action for slander, to which the general issue and a jurisdiction were pleaded, the plaintiff expressed his willingness to accept an apology and nominal damages if the plea of justification were withdrawn, but the defendant refused to abandon this plea, though he offered no evidence in support of its truth, the court held that the jury might consider the defendant's conduct, not only with reference to the question of damages, but as furnishing evidence of express malice, and thus rendering the words proved actionable, though they were *prima facie* privileged communications.<sup>2</sup> § 318

§ 342. If, however, to an action for a libel, the defendant were to set up as his defence a privileged communication and justification, the jury, in forming an opinion, under the first issue, should not, as it seems, take into consideration the circumstance that the justification had been pleaded, provided that such defence were openly abandoned at the trial.<sup>3</sup> So, if it clearly appear that other libels are offered in evidence, merely with the view of unfairly recovering § 319

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in respect of it; and if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. And perhaps the cases of *Pearce v. Ormsby* and *Symmons v. Blake* went no farther than this. \* \* Upon principle, we think, that the *spirit and intention* of the party publishing a libel are fit to be considered by a jury, in estimating the injury done to the plaintiff, and that evidence tending to prove them cannot be excluded, simply because it may disclose another and different cause of action." 5 M. & Gr. 719, 720. See, also, *Russell v. Macquister*, 1 Camp. 49, n., where *Ld. Ellenborough* remarked, that the distinction between words actionable and not actionable was not founded on any principle; and *Camfield v. Bird*, 3 C. & Kir. 56, per *Jervis*, C. J.

<sup>1</sup> 12 M. & W. 507.

<sup>2</sup> *Simpson v. Robinson*, 12 Q. B. 511. <sup>3</sup> *Wilson v. Robinson*, 7 Q. B. 68.

damages for the injury sustained by *their* publication, they will properly be rejected;<sup>1</sup> and it seems that no subsequent libels will be admitted, unless they directly refer to the defamatory language set out in the statement of claim, or at least relate to the same subject matter.<sup>2</sup>

§ 343. Not only is other defamatory matter admissible for the purpose of showing the animus of the defendant, but the *mode* in which such matter was published may also be highly material; as for instance, if printed placards were sent to the plaintiff's house, or paraded before his door.<sup>3</sup>

§ 344. On the same principle the defendant, in mitigation of damages, has been allowed to give evidence palliating, though not justifying, his act of publishing a libel, as, for instance, that he copied it from another newspaper,<sup>4</sup> or that he had been *provoked* to act as he had done by the conduct of the plaintiff, who had previously published libels of him respecting the same subject-matter. But in this last case some proof must be given that the libels published by the plaintiff had first come to the knowledge of the defendant,<sup>5</sup> since they are admissible, not on the ground of any right to set off one libel against another,<sup>6</sup> but simply from an indulgent

<sup>1</sup> See cases cited, *ante*, in n.<sup>o</sup>, p. 322; *Stuart v. Lovell*, 2 Stark R. 95; *Defries v. Davis*, 7 C. & P. 112.

<sup>2</sup> *Finnerty v. Tipper*, 2 Camp. 72, per Sir J. Mansfield.

<sup>3</sup> *Bond v. Douglas*, 7 C. & P. 626, per Ld. Abinger.

<sup>4</sup> *Saunders v. Mills*, 6 Bing. 213 cited by Tindal, C. J., in *Pearson v. Le Maitre*, 5 M. & Gr. 719. In *Talbutt v. Clark*, 2 M. & Rob. 312, Ld. Denman would not permit the editor of a newspaper to show, in mitigation of damages, that the libel was published on the communication of a correspondent; and referring to a case which was probably *Saunders v. Mills*, his Lordship observed, that "that decision had been very much questioned." However, by the recognition of *Saunders v. Mills* in *Pearson v. Le Maitre*, the case of *Talbutt v. Clark* would seem to be indirectly overruled. See, also, *East v. Chapman*, M. & M. 46; 2 C. & P. 570, S. C., per Abbott, C. S.; *Charlton v. Watson*, 6 C. & P. 385, per Patteson, J.; *Creedy v. Carr*, 7 C. & P. 64.

<sup>5</sup> *Watts v. Fraser*, 7 A. & E. 223; 7 C. & P. 369, S. C.; *Tarpley v. Blabey*, 2 Bing. N. C. 437; 2 Scott, 642; 7 C. & P. 395, S. C.; *May v. Brown*, 3 B. & C. 113; 4 D. & R. 670, S. C.; *Wakley v. Johnson* Ry. & M. 422; *Finnerty v. Tipper*, 2 Camp. 72. See *Richards v. Richards*, 2 M. & Rob. 557.

<sup>6</sup> *Watts v. Fraser*, 7 C. & P. 370, per Ld. Denman. In *Judge v. Berkeley*, cited *id.* 371, n. a, Burrough, J., allowed the defendant, in an action of assault, (3190)



consideration of the weakness of human nature, which leads a man, when his feelings are exasperated, to say "that he should be sorry for." Moreover, in all cases of this kind, where the defendant, without asserting the truth of his statement, attempts to reduce the damages by referring to the circumstances which influenced his conduct, he can now only do so in one of two ways; either he must obtain the leave of a judge, or, a week before the trial, he must furnish the plaintiff with particulars of the matters on which he relies. The New Rule on this subject is as follows:—

"In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."<sup>1</sup>

§ 345. Evidence of this kind is very frequently admitted in criminal proceedings. Thus, on an indictment for knowingly uttering a forged document, or a counterfeit bank note, or counterfeit coin, proof of the possession, or of the prior or subsequent<sup>2</sup> utterance, either to the prosecutor himself or to other persons, of other false documents or notes, or bad money, though of a different description,<sup>3</sup> and though themselves the subjects of separate indictments,<sup>4</sup> is admissible as material to the question of

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to prove, in mitigation of damages, a series of libellous articles published respecting him by the plaintiff, one of which appeared on the day of the assault.

<sup>1</sup> Rules of Sup. Ct., 1883, Ord. XXXVI., R. 37.

<sup>2</sup> *R. v. Forster*, Pearce & D. 456. This case disposes of a doubt raised in *R. v. Taverner*, Carr. Supp. 195; 4 C. & P. 413, n. a, S. C.; and in *R. v. Smith*, 4 C. & P. 411; as to whether evidence of subsequent utterings would be admissible, if the notes or coin were of a different description.

<sup>3</sup> *R. v. Harris*, 7 C. & P. 429, by all the judges; *R. v. Forster*, Pearce & D. 456. Doubts had been entertained on this subject by some of the judges, in *R. v. Millard*, R. & R. 245, but the evidence was admitted in *Sunderland's*, *Hodgson's*, *Kirkwood's*, and *Martin's* cases, 1 Lew. C. C. 102—104. The same evidence is admissible in Scotland; *Alison*, Cr. L. 420.

<sup>4</sup> *R. v. Hough*, R. & R. 122; *R. v. Weeks*, 8 Cox, 455; *Kirkwood's* case, 1 (3191)

*guilty knowledge* or *intent*;<sup>1</sup> but in these cases it is essential to prove distinctly that the instruments offered in evidence of guilty knowledge were themselves forged.<sup>2</sup> It seems also, that though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, he cannot proceed to show what the prisoner said or did at another time, with respect to such uttering; for these are collateral facts, too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict.<sup>3</sup>

§ 346. This laxity of evidence, which has long prevailed in charges of uttering, and of one or two offences of a cognate character,<sup>4</sup> has also, with respect to the receivers of stolen goods, been expressly sanctioned by the Legislature. Thus, "The Prevention of Crimes Act, 1871,"<sup>5</sup> in § 19, contains an enactment that, "where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any

Lew. C. C. 103, per Littledale, J.; Martin's case, *id.* 104, per *id.*; R. v. Aston, 2 Russ. C. & M. 407, per Alderson, B.; R. v. Lewis, *id.*, per Ld. Denman, who observed, that "he could not conceive that the relevancy of the fact to the charge could be effected by its being the subject of another charge." *Contrá* R. v. Smith, 2 C. & P. 633, per Vaughan, B.

<sup>1</sup> R. v. Wylie, 1 N. R. 92, 94; 2 Lea. 983, S. C., *nom.* R. v. Wylie; R. v. Ball, 1 Camp. 324; R. & R. 132, S. C.; R. v. Harrison, 2 Lew. C. C. 118, per Taunton, J., and Alderson, B.; R. v. Green, 3 C. & Kir. 209, per Cresswell, J.; R. v. Nisbett, 6 Cox, 320, per Williams, J.; R. v. Salt, 3 Fost. & Fin. 834, per Williams, J.; R. v. Colclough, 15 Cox, 92, Ir. C. C.; 10 L. R., Ir. 241, S. C.

<sup>2</sup> R. v. Millard, R. & R. 245.

<sup>3</sup> R. v. Phillips, 1 Lew. C. C. 105, per Bayley, J.; R. v. Cooke, 8 C. & P. 586, per Patteson, J. *Contrá*, R. v. Forbes, 7 C. & P. 224, per Coleridge, J. See R. v. Brown, 2 Fost. & Fin. 559.

<sup>4</sup> E. g. the obtaining money by falsely pretending to a pawnbroker that a spurious chain was silver; R. v. Roebuck, Dear. & Bell. 24, 26; R. v. Francis, 43 L. J., M. C. 97; 2 Law Rep., C. C. 128; 12 Cox, 612, S. C. The doctrine, however, does not extend to ordinary indictments for false pretences; R. v. Holt, 30 L. J., M. C. 11; Bell, C. C. 280, S. C.; 8 Cox, 411, S. C. Still, it has been applied to cases of arson with intent to defraud insurance companies; R. v. Gray, 4 Fost. & Fin. 1102, per Willes, J., & Martin, B.; *sed qu.*

<sup>5</sup> 34 & 35 V., c. 112.

stage of the proceedings that there was found<sup>1</sup> in the possession of such person other property stolen within the preceding period of twelve months,<sup>2</sup> and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen, which forms the subject of the proceedings taken against him."

§ 347. Notwithstanding the above enactment, and perhaps, even, § 323A in consequence of it, the judges may still decline to recognise the doctrine under discussion in ordinary criminal trials.<sup>3</sup> Thus much, however, may be safely predicated, that, on a charge of sending a threatening letter, other letters written by the prisoner, both before and after the one in question, are admissible to explain its meaning;<sup>4</sup> on an indictment for malicious shooting, if it be doubtful whether the shot was fired by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person;<sup>5</sup> and in indictments for murder, while evidence of former menaces or quarrels will have an important tendency towards supporting the legal inference of malice,<sup>6</sup> proof of expressions of kindness or of friendly acts towards the deceased will be entitled to equal weight as raising a counter presumption.<sup>7</sup>

§ 348. In like manner, on an indictment for robbery, where § 324 it appeared that the prisoners had formed part of a mob, who went into the prosecutor's house, and that one of the mob had

<sup>1</sup> It is not sufficient under these words to prove that the prisoner had very recently *dealt with* other stolen property; *R. v. Drage*, 14 Cox, 85, per Bramwell, L. J.; *R. v. Carter*, decided by Ct. of Cr. App., 5 Apl. 1884; L. R., 12 Q. B. D. 522; 53 L. J., M. C. 96, S. C.; and 15 Cox, 448."

<sup>2</sup> This evidence will be admissible, though the property so found may be the subject of another indictment against the prisoner at the same assizes; *R. v. Jones*, 14 Cox, 3.

<sup>3</sup> See and compare *R. v. Fairie*, 8 E. & B. 496; *R. v. Winslow*, 8 Cox, 397; *R. v. Geering*, 18 L. J., M. C. 215, cited ante, § 327; *R. v. Oddy*, 2 Den. 284; *R. v. Sirrell*, cited in *id.* 267; *R. v. Dunn*, 1 Moo. C. C. 146; *R. v. Nicholls*, 1 Fost. & Fin. 51. See, also, *R. v. Flannagan*, 15 Cox, 463, per Butt, J., following *R. v. Geering*.

<sup>4</sup> *R. v. Robinson*, 2 East, P. C. 1110, 1112.

<sup>5</sup> *R. v. Voke*, R. & R. 531. For other examples, see *R. v. Mogg*, 4 C. & P. 364; *R. v. Dossett*, 2 C. & Kir. 306, per Maule, J.; *R. v. Richardson*, 2 Fost. & Fin. 343; 8 Cox, 448, S. C.; *R. v. Harris*, 4 Fost. & Fin. 342. See, also, ante, §§ 327, 328.

<sup>6</sup> See *R. v. Hagan*, 12 Cox, 357.

<sup>7</sup> 1 Ph. Ev. 470, 476.

civilly advised him to give them something to prevent mischief, evidence that this mob, in the presence of some of the prisoners, had demanded money at other houses on the same day, was admitted, as tending to prove that the advice was not given bona fide, but was in reality a polite mode of committing a robbery.<sup>1</sup> This last case differs from those just cited in one respect, namely, that the acts given in evidence were not committed by the prisoners themselves, but only by some of the mob with whom they were connected. The principle, however, is the same; for the law has wisely provided, that where several evil-doers conspire together to effect some unlawful purpose, the acts done by one of the party in furtherance of the common design shall be considered as done by all.<sup>2</sup>

§ 349. To this rule may be referred the admissibility of evidence § 35  
respecting the *general character* of individuals. Such evidence is tendered for the purpose of either raising a *presumption* of innocence or guilt, or affecting the *amount of damages*, or of impeaching or supporting the *veracity* of a witness;<sup>3</sup> the first object being chiefly confined to criminal prosecutions, and the second to civil causes, while the third is equally applicable to both modes of procedure.

§ 350. The term "character," as here used, is not,—as some of § 351  
our ablest judges have considered it to be,—synonymous with "disposition," but it simply means "reputation," or the general credit which a man has obtained in public opinion.<sup>4</sup> A witness, therefore, who is called to speak to character,—unlike a master who is asked for the character of his servant,—cannot give the result of his own personal experience and observation, or express his own opinion, but, in strict law he must confine himself to evidence of mere general repute.<sup>5</sup> This rule,—which appears to rest rather

<sup>1</sup> R. v. Winkworth, 4 C. & P. 444, per Parke, J., with the concurrence of Ld. Tenterden, Alderson, J., and Vaughan, B.

<sup>2</sup> R. v. Watson, 32 How. St. Tr. 7; R. v. Hardy, 24 id. 704; R. v. Salter, 5 Esp. 125; R. v. Hunt, 3 B. & A. 568.

<sup>3</sup> 2 St. Ev. 303.

<sup>4</sup> R. v. Rowton, 34 L. J., M. C. 57; L. & Cave, 520; 10 Cox, 25, S. C., per Erle, C. J., & Willes, J.

<sup>5</sup> R. v. Rowton, 34 L. J., M. C. 57; L. & Cave, 520; 10 Cox, 25, S. C., per Cur., Erle, C. J., & Willes, J., diss.

<sup>6</sup> Id. See post, § 1470.

on authority than on reason,—would probably have been rejected long ago by the courts, had it not been for two causes. First, the rule, in practice, is seldom strictly enforced; and, next, it has to a certain extent been modified by the judges. Aware that “the best character is generally that which is the least talked about,”<sup>1</sup> they have found it necessary to permit witnesses to give negative evidence on the subject, and to state that “they never heard anything *against* the character of the person on whose behalf they have been called.”<sup>2</sup> Nay, some of the judges have gone so far as to assert that evidence in this negative form is the most cogent proof of a man’s good reputation.<sup>3</sup>

§ 351. When the point at issue is whether the accused has § 326 committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubts exists as to his guilt; and, therefore, in this event alone will the jury be advised to act upon such evidence.<sup>4</sup> The inquiry, too, must be confined,—except where the *intention* forms a material ingredient in the offence,<sup>5</sup>—to the *general* character of the prisoner, and must not condescend to *particular* facts;<sup>6</sup> for although the common reputation, in which a person is held in society, may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, some inference, varying in degree according to circumstances, may still fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or a cruel act. But the mere proof of isolated facts can afford no such presumption. “None are all evil,” and the most consummate villain

<sup>1</sup> Per Erle, C. J., 34 L. J., M. C. 63; L. & Cave, 535; 10 Cox, 33. S. C.

<sup>2</sup> Per Cockburn, C. J., 34 L. J., M. C. 64, L. & Cave, 536; 10 Cox. 34, S. C.

<sup>3</sup> Id.

<sup>4</sup> In *R. v. Turner*, 6 How. St. Tr. 613, Hyde, C. J., observed to the jury:—  
“The witnesses called in point of reputation I must leave to you. Few men that come to be questioned but shall have some come and say, ‘he is a very honest man; I never knew any hurt by him;’ but is this *anything against the evidence of the fact?*”

<sup>5</sup> Ante, § 345.

<sup>6</sup> *J’Anson v. Stuart*, 1 T. R. 754, per Buller, J. In former times the practice was less strict. See *R. v. Turner*, 6 How. St. Tr. 606, 607.

may be able to prove, that on *some* occasions he has acted with humanity, fairness, or honour. In all cases, too, when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him;<sup>1</sup> as, for instance, if he be accused of theft, that he has been reputed an honest man;—if of treason, a man of loyalty. It should also relate to the same period as the supposed offence; for, as Lord Holt once remarked, “A man is not born a knave; there must be time to make him so, nor is he presently discovered after he becomes one.”<sup>2</sup> Subject to these observations, evidence of the defendant’s general good character is admissible in all prosecutions whether for felony or misdemeanor.<sup>3</sup>

§ 352. Although the defendant, from motives of humanity, is <sup>327</sup> allowed this reasonable indulgence, the prosecutor cannot, in the first instance, have recourse to the same loose testimony, for the purpose of establishing the guilt of the accused;<sup>4</sup> but if, with the view of raising a presumption of innocence, witnesses to character are called for the defence, the counsel for the Crown may then rebut this presumption, by cross-examining the witnesses, either as to particular facts,<sup>5</sup> or, if they deem it essential, as to the ground of their belief.<sup>6</sup> Evidence of general bad character will also in such case be admissible,<sup>7</sup> though it is seldom resorted to in practice.<sup>8</sup> In most trials for felony, and in some for misdemeanor, if the defendant endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the

<sup>1</sup> *Douglass v. Tonsey*, 2 Wend. 352.

<sup>2</sup> *R. v. Swendsen*, 14 How. St. Tr. 596.

<sup>3</sup> 2 Russ. C. & M. 784.

<sup>4</sup> *R. v. Tuberfield*, 34 L. J., M. C. 20; L. & Cave, 495; 10 Cox, 1, S. C. In that case the question was put, not to prove the guilt of the prisoner, but to show that the witness, a policeman, had had probable cause for arresting him. Held, nevertheless, that the answer was not evidence.

<sup>5</sup> *R. v. Hodgkiss*, 7 C. & P. 298. In *R. v. Wood*, 5 Jur. 225, Parke, B., allowed a witness to character to be asked, in cross-examination, whether he had not heard that the prisoner was *suspected* of having committed a robbery some years before. See, also, *R. v. Turner*, 6 How. St. Tr. 607.

<sup>6</sup> 2 St. Ev. 304.

<sup>7</sup> *R. v. Rowton*, 34 L. J., M. C. 57; L. & Cave, 520; 10 Cox, 25, S. C.; by all the judges, overruling *R. v. Burt*, 5 Cox, 284.

<sup>8</sup> 2 St. Ev. 304.

witnesses for the prosecution,<sup>1</sup> the prosecutor is at liberty, in answer thereto, to give proof of the prisoner's previous conviction; but the statutes, which allow this course to be adopted, have strangely omitted all mention of *capital* felonies, and apply only partially to misdemeanors.<sup>2</sup>

§ 353. Receivers of stolen goods have recently been subjected § 327A to a peculiar law, which, though probably salutary, is somewhat at variance with the human doctrine illustrated in the last section. Thus, "The Prevention of Crimes Act, 1871,"<sup>3</sup> enacts, in § 19, that "where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less

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<sup>1</sup> 1 R. v. Shrimpton, 2 Den. 319; 3 C. & Kir. 373, S. C.; R. v. Gadbury, 8 C. & P. 676, per Parke, B.

<sup>2</sup> 6 & 7 W. 4, c. 111, after reciting that, by the Act of 7 & 8 G. 4, c. 28, "provision is made for the more exemplary punishment of offenders, who shall commit *any felony not punishable with death*, after a previous conviction for felony," provides, among other things, that, "if, upon the trial of any person for *any such subsequent felony as aforesaid*, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony." The Larceny Act of 1861 contains a somewhat similar provision with respect to offenders punishable under that Act; 24 & 25 V., c. 96, § 116. So does the Act of 1861, relating to offences against the coin; 24 & 25 V., c. 99, § 37. See R. v. Martin, 1 Law Rep., C. C. 214; 11 Cox, 343, S. C. So does "The Prevention of Crimes Act, 1871," with respect to any "crime as defined" by that Act, that is, "any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under 24 & 25 V., c. 96, § 58." See 34 & 35 V., c. 112, §§ 9, 20.

<sup>3</sup> 34 & 35 V., c. 112.

than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused."<sup>1</sup>

§ 354. As evidence of general character can, at best, afford only a glimmering light, when the question is whether a party has done a certain act or not, its admission for such a purpose is exclusively confined to criminal proceedings, in which it was originally received, some two centuries ago,<sup>2</sup> in *favorem vite*; and so strict is this rule, that even upon an information filed in the Revenue side of the Queen's Bench Division by the Attorney-General, with the view of recovering penalties from the defendant, for keeping false weights, and for offering to corrupt an officer, such evidence will be rejected, because proceedings of this kind, though brought in the name of the Sovereign, are considered as civil suits.<sup>3</sup> So, in an action of ejectment brought by the heir-at-law against a devisee, where the defendant was charged with having imposed a fictitious will on the testator in extremis, he was not permitted to call witnesses to prove his general good character;<sup>4</sup> and a similar rule was laid down in an action for slander, where the words charged the plaintiff with stealing money from the defendant, though the latter, by pleading truth as a justification, had to put the character of the former directly in jeopardy.<sup>5</sup> In an action, too, for a libel, which charged a surveyor with want of skill in doing some par-

<sup>1</sup> *R. v. Davis*, 1 Law Rep., C. C. 272; 39 L. J., M. C. 135; and 11 Cox, 578, S. C.

<sup>2</sup> In 1664 the practice of calling "witnesses in point of reputation" was well established. See, per Hyde, C. J., in *R. v. Turner*, 6 How. St. Tr. 613. In 1680, such evidence was received by Scroggs, C. J., Mr. Recorder Jefferies being the prosecutor, *R. v. Harris*, 7 How. St. Tr. 926, 929.

<sup>3</sup> *Att.-Gen. v. Bowman*, 2 B. & P. 532, n. a, per Eyre, C. B. His Lordship observed, that "the true line of distinction is this; in a direct prosecution for a crime, such evidence is admissible; but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not." See *Att.-Gen. v. Radloff*, 10 Ex. R. 84, 97, per Martin, B.

<sup>4</sup> *Doe v. Hicks*, per Buller, J., cited by Gibbs, *arguendo*, in *Doe v. Walker*, 4 Esp. 50; B. N. P. 296, nom. *Goodright v. Hicks*, S. C.

<sup>5</sup> *Cornwall v. Richardson*, Ry. & M. 305, per Abbott, C. J.



ticular work for the defendant, the plaintiff was not allowed to prove his general competency as a surveyor, though he offered this evidence with the view of showing that the defendant, in making the charge, was actuated by malice.<sup>1</sup> It seems,—notwithstanding a decision by Lord Kenyon to the contrary,<sup>2</sup>—that, in an action for malicious prosecution, the defendant, in support of probable cause, cannot give evidence of the plaintiff's notoriously bad character:<sup>3</sup> and it has been held that, in an action of trespass for false imprisonment on a criminal charge, the defendant must not cross-examine, either as to the plaintiff's bad character, or as to previous charges made against him.<sup>4</sup>

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§ 355. A distinction, however, has been taken between cases where particular acts of misconduct are imputed to a party, and those where his *general conduct is put in issue*; and though evidence of character is rejected in the former, it has several times been admitted in the latter class of cases.<sup>5</sup> Thus, in an action for a libel, contained in an answer to inquiries respecting the character of a governess, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being ladylike or good tempered," general evidence was given of her competency, good-temper, and manners, by witnesses who were her personal friends;<sup>6</sup> and on the same principle, where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness, with whom she had formerly lived, was allowed to testify to her antecedent good conduct.<sup>7</sup> These cases, however,

<sup>1</sup> *Brine v. Bazalgette*, 3 Ex. R. 692.

<sup>2</sup> *Rodriguez v. Tadmire*, 2 Esp. 271.

<sup>3</sup> *Newsam v. Carr*, 2 Stark. R. 69, per Wood, B.; *Gregory v. Thomas*, 2 Bibb, 286. In America, this kind of evidence has been also rejected in actions of assault and battery, *Givens v. Bradley*, 3 Bibb, 192; and in assumpsit, *Nash v. Gilkeson*, 5 Serg. & R. 352; and is held to be inadmissible whenever the general character is involved by the plea only, and not by the nature of the action, *Anderson v. Long*, 10 Serg. & R. 55; *Potter v. Webb*, 6 Greenl. 14. See Gr. Ev. § 55.

<sup>4</sup> *Downing v. Butcher*, 2 M. & Rob. 374; *Jones v. Stevens*, 11 Price, 235.

<sup>5</sup> *Doe v. Hicks*, per Buller, J., as cited by Gibbs, *arguendo*, in 4 Esp. 50.

<sup>6</sup> *Fountain v. Boodle*, 3 Q. B. 5. See *Brine v. Bazalgette*, 3 Ex. R. 692.

<sup>7</sup> *King v. Waring*, 5 Esp. 14, per *Ld. Alvanley*.

can scarcely be deemed an exception to the rule of exclusion; for it is clear that, as in cumulative offences, such as treason or a conspiracy to carry on the business of common cheats, many acts are given in evidence, because such crimes can be proved in no other way,<sup>1</sup> so, where the general behaviour of a party is impeached, it is only by general evidence that the charge can be rebutted.

§ 356. It has been above observed, that in some cases general evidence of character is admissible, for the purpose of increasing or diminishing the amount of damages.<sup>2</sup> Thus, evidence impeaching the previous general character of the wife or daughter in regard to chastity, is admissible in a petition by the husband for damages on the ground of adultery,<sup>3</sup> or in an action by the father for seduction;<sup>4</sup> for in these proceedings the plaintiff in reality seeks compensation for the pain which the defendant has caused him to suffer, by disgracing his family, and ruining his domestic happiness; and it is manifest that, such being the true nature of the claim, though in cases of seduction not the ostensible ground of action,<sup>5</sup> the damages should be commensurate with the pain, which will vary according as the character of the wife or daughter has been previously unblemished or profligate. In these cases, therefore, not only evidence of general bad character is admissible in mitigation of damages, but the defendant may even prove particular acts of immorality or indecorum.<sup>6</sup>

§ 357. But evidence of these acts, as well as proof of general bad

<sup>1</sup> *R. v. Roberts*, 1 Camp. 399, per *Ld. Ellenborough*.

<sup>2</sup> *Ante*, § 349.

<sup>3</sup> 20 & 21 V., c. 85, § 33.

<sup>4</sup> *B. N. P.* 27, 296; *Elsam v. Faucett*, 2 Esp. 563, per *Ld. Kenyon*.

<sup>5</sup> See *Dodd v. Norris*, 3 Camp. 520, per *Ld. Ellenborough*; *Andrew v. Askey*, 8 C. & P. 9, per *Tindal, C. J.* See, also, cases cited in *n. a.*, to S. C.; *Grinnell v. Wells*, 7 M. & Gr. 1033, 1043; *Thompson v. Ross*, 29 L. J., Ex. 1; 5 H. & N. 16, S. C.; *Long v. Keightley*, 11 C. L. 221; *Rist v. Faux*, 4 B. & S. 409, per *Ex. Ch.*; 32 L. J., Q. B. 386, S. C.; *Terry v. Hutchinson*, 27 L. J., Q. B. 257; 9 B. & S. 487, S. C.; *Hedges v. Tagg*, 7 Law Rep., Ex. 283; 41 L. J., Ex. 169, S. C.

*Verry v. Watkins*, 7 C. & P. 308, per *Alderson, B.*; *B. N. P.* 27, 296.

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character, must be confined to what occurred *previously* to the defendant's misconduct, because this very misconduct may, by weakening the principles of the woman, have directly caused any subsequent immorality, and may itself have directly occasioned her general want of reputation.<sup>1</sup> Whether in an action of seduction, where the plaintiff's daughter is called as a witness, the defendant can prove specific acts of immorality, without first laying a foundation for such evidence in the cross-examination of the woman, is not perfectly clear; though, on principle, such a course seems open to no objection, provided the evidence be tendered with the view, not of impeaching the veracity of the party seduced, but of showing that, as her previous conduct had been disgraceful, the father's feelings could not have been wounded by the misconduct of the defendant.<sup>2</sup> However, if the daughter, in her examination in chief, states that the defendant had seduced her, and that she has borne a child in consequence, and the defence is that she has declared another person to be the father, it is clear that witnesses cannot be called to prove her declarations, unless she be first cross-examined as to the fact of her having made them; because, though language of this kind, if light uttered, would tend to degrade her character, yet if used in earnest, it would directly contradict the testimony she had given, and would be evidence, not in mitigation of damages, but in bar of the action.<sup>3</sup>

§ 358. On a petition claiming damages from an alleged adul- § 332  
terer,<sup>4</sup> the co-respondent may also prove in mitigation of damages, that the petitioner has been guilty of notorious infidelity; has turned his wife out of doors; has refused to maintain her; or has otherwise been guilty of dissolute conduct;<sup>5</sup> for, in such cases, a man can scarcely complain of the loss of that society, upon which he has himself placed so little value. It seems, also, that upon a like principle, evidence may be given in an action for seduction, that the plaintiff is a man of profligate habits. In actions for breach

<sup>1</sup> *Elsam v. Faucett*, 2 Esp. 562; B. N. P. 27.

<sup>2</sup> *Carpenter v. Wall*, 11 A. & E. 803; 3 P. & D. 457, S. C.

<sup>3</sup> *Id.*; *Andrews v. Askey*, 8 C. & P. 9, per Tindal, C. J.

<sup>4</sup> See 20 & 21 V., c. 85, § 33.

<sup>5</sup> B. N. P. 27; *Bromley v. Wallace*, 4 Esp. 237.

of promise of marriage a similar rule prevails, the defendant being entitled to prove in mitigation of damages, that the plaintiff is a person, either of bad character,<sup>1</sup> or of course and brutal manners,<sup>2</sup> though if the acts of misconduct relied upon were committed *after* the promise, or even *before* that event *without the knowledge* of the defendant,<sup>3</sup> and were sufficiently glaring to constitute a bar to the action,<sup>4</sup> they can only be proved under a special defence.<sup>5</sup>

§ 359. Whether in an action for defamation, evidence impeach- § 333  
ing the plaintiff's previous general character, and showing that, at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant, is admissible as affecting the question of damages, is a point which has been much controverted. On the one hand it is urged, that the admission of such evidence would be cruelly unjust, as it would throw upon the plaintiff, while seeking redress in a court of justice for a specific injury, the difficulty of showing an uniform propriety of conduct during his whole life, and would give the defendant an opportunity, under pretence of mitigating the damages, of continuing and aggravating the original calumny; and that, too, under circumstances, when, from the absence of any plea of justification, his opponent was utterly unprepared to disprove the aspersions. It is further contended, that if such evidence were admissible, any man might fall a victim to a combination made to ruin his good name, even by means of the very action which he should bring in order to free himself from the effects of malicious slander; that timid, though well-conducted men, would consequently not dare to vindicate their characters in courts of justice, and thus libellers would enjoy a most dangerous impunity.

§ 360. To this it is replied with much force, that, though the § 333

<sup>1</sup> Foulkes v. Sellway, 3 Esp. 236, Ld. Kenyon. See, also, Johnson v. Caulkins, 1 Johns. C. 116; Boynton v. Kellogg, 3 Mass. 189.

<sup>2</sup> Leeds v. Cook, 4 Esp. 258, per Ld. Ellenborough.

<sup>3</sup> Irving v. Greenwood, 1 C. & P. 350, per Abbott, C. J.

<sup>4</sup> Leeds v. Cook, 4 Esp. 256; Baddeley v. Mortlock, Holt, N. P. R. 151.

<sup>5</sup> Ante, § 301. See Young v. Murphy, 3 Bing. N. C. 54; and Pujolas v. Holland, Ir. Cir. R. 19.

arguments on the other side would be entitled to great weight, if the question respected the right of proving *particular acts* of misconduct; they do not apply where evidence is offered of merely *general reputation*; that every man who demands compensation for the ruin of his good character, ought to be prepared to rebut any evidence of his general bad character; that the danger of admitting testimony of this kind is only imaginary, since the witnesses, on cross-examination, might be compelled to state the grounds of their belief; that, as any failure in the evidence would probably much increase the damages, witnesses would scarcely be called, except in support of a decisive case; that the law will not presume the existence of criminal conspiracies to ruin reputations, and cannot be moulded to suit the convenience of irrational timidity; that to estimate the extent of the injury which a plaintiff has sustained, and, consequently, the amount of damages to which he is entitled, the jury must first ascertain what was the real value of his character at the time when it was attacked by the defendant; and, that they can best, if not only, arrive at a safe conclusion on this point, by inquiring what opinion was previously entertained respecting him, by those with whom he was personally acquainted.<sup>1</sup>

§ 360A. Such being the arguments on either either side of this

<sup>1</sup> See, in support of the admissibility of the evidence, *Richards v. Richards*, 2 M. & Rob. 557; ——— *v. Moor*, 1 M. & Sel. 284; *Ld. Leicester v. Walter*, 2 Camp. 251; *Bell v. Parke*, 11 Ir. Law R., N. S. 413, per Pigot, C. B.; *Williams v. Callender*, Holt, N. P. R. 307; *Eamer v. Merle*, per Ld. Ellenborough, cited 2 Camp. 253; *Knobell v. Fuller*, Pea. Add. Cas. 139, per Eyre, C. J.; *Newsman v. Carr*, 2 Stark. R. 70, per Wood, B.; *Ellershaw v. Robinson*, per Holroyd, J.; *Moore v. Oastler*, in 1836, per Ld. Denman, after consulting Parke, B.; *Mawby v. Barber*, in 1826, per Ld. Tenterden; and *Hardy v. Alexander*, in 1837, per Coltman, J. These last four cases are cited in 2 St. Ev. 641, 642, n. e. *Kirkman v. Oxley*, per Heath, J., cited 2 St. Ev. 306, n. k. See contra—*Scott v. Sampson*, L. R., 8 Q. B. D. 491, per Mathew & Cave, J.J.; 51 L. J., Q. B. 380, S. C.; *Jones v. Stevens*, 11 Price, 325; *Waithman v. Weaver*, D. & R., N. P. C. 10; 11 Price, 257, n. S. C.; *Cornwall v. Richardson*, Ry. & M. 305, per Abbott, C. J.; *Snowdon v. Smith*, per Chambre, J., cited 1 M. & Sel. 286. In Scotland the evidence is admissible. *Dickson*, Ev. § 24, and cases there cited in n. (d). For the American authorities, see *Root v. King*, 7 Cowen, 613; *Bailey v. Hyde*, 3 Conn. 463; *Bennett v. Hyde*, 6 Conn. 24; *Douglass v. Tousey*, 2 Wend. 352; *Inman v. Foster*, 8 Wend. 602; *Walcott v. Hall*, 6 Mass. 514; *Ross v. Lapham*, 14 Mass. 275; *Foot v. Tracy*, 1 Johns. 45.

vexed question, it remains only to observe that,—*assuming* the evidence to be admissible,—the defendant, who has not pleaded truth as a justification, is now precluded, by a recent Rule of Court,<sup>1</sup> from attempting to mitigate damages by giving evidence reflecting on the plaintiff's character, unless he has first taken one of two courses; that is, he must either have obtained the leave of a judge, or he must, at least seven days before his trial, have furnished "particulars to the plaintiff of the matters as to which he intends to give evidence."

§ 361. It seems, also, that here, as in other cases where witnesses to character are admitted, evidence must be confined to the particular trait which is attacked in the alleged libel, and, as to this, it can only furnish proof of *general reputation*, and must by no means condescend to particular *acts* of bad conduct.<sup>2</sup> And it is quite clear, that any evidence of rumors, which are calculated to compromise the plaintiff's character, must be strictly confined to such as were prevalent *before* the publication of the slander of the defendant; for if this were not so, one man might slander another, and then call his neighbours to say that they had heard of the imputations which he had himself originated.<sup>3</sup>

§ 362. In *aggravation of damages* the plaintiff cannot give evidence of *general good character*, unless counter-proof has been first offered by the defendant: for, until the contrary appear, the presumption of law is already in his favour. Therefore, in an action of slander for imputing theft, the plaintiff will not be allowed to prove his character for honesty, even though the defendant has placed on the record pleas of justification.<sup>4</sup> This rule has, in some cases, been carried to a cruel extent. Thus, in an action for seduction, where evidence was produced for the defence, to prove that the girl had previously had a child by another man, Lord Ellenborough would not allow a question to be asked respecting her general good character for chastity, but

<sup>1</sup> Rules of Sup. Ct., 1883, Ord. XXXVI., R. 37, cited ante, § 344, ad. fin.

<sup>2</sup> See cases cited in last note but one, and further, *Andrews v. Vanduzer*, 11 Johns. 38; *Sawyer v. Eifert*, 2 Nott & M'C. 511.

<sup>3</sup> *Thompson v. Nye*, 16 Q. B. 175; *Bell v. Parke*, 11 Ir. Law R., N. S. 413.

<sup>4</sup> *Cornwall v. Richardson*, Ry. & M. 305, per Abbott, C. J.

restricted the plaintiff to the proof that the specific charge made by the defendant was false;<sup>1</sup> and the same learned judge on another occasion, where the daughter was cross-examined at length, with a view of showing that she had been guilty of gross levity and indelicacy, rejected similar evidence, observing that the witness, on her re-examination, had had ample opportunity of explaining her conduct.<sup>2</sup> In another case for criminal conversation, in which the defendant had endeavored, by cross-examining the plaintiff's witnesses to impeach his character, but had failed in the attempt, Lord Kenyon refused to permit the plaintiff to call witnesses to his general good conduct.<sup>3</sup> It is true that in these cases the facts insinuated had, or might have, been denied, and that, consequently, the characters attacked remained in strictness unimpeached; still, the very circumstance of the questions being asked was calculated to excite a suspicion in the minds of the jury, which, in common justice, the plaintiff should have had an opportunity of entirely removing.<sup>4</sup> It is satisfactory to find that a contrary rule has prevailed in two later cases,<sup>5</sup> one of which has been recognised in Ireland.<sup>6</sup>

§ 363. The law which regulates the admission of general evidence of character for the purpose of *impeaching the veracity of a witness* will be discussed hereafter;<sup>7</sup> but it may be here convenient to point out how far such evidence will be receivable, where its object is, not so much to shake the credit of the witness, as to show directly that the act in question has not been committed. Thus, on indictments for rape, or an attempt to commit that crime, while evidence of general bad character is admissible to show that the prosecutrix, like any other witness, ought not to

<sup>1</sup> Bamfield v. Massey, 1 Camp. 460.

<sup>2</sup> Dodd v. Norris, 3 Camp. 519.

<sup>3</sup> King v. Francis, 3 Esp. 116.

<sup>4</sup> 1 C. & P. 100, n. a; 2 St. Ev. 306, 307.

<sup>5</sup> Bate v. Hill, 1 C. & P. 100, per Park, J.; Murgatroyd v. Murgatroyd, per Bayley, J., cited 2 St. Ev. 307, n. o. See, also, R. v. Clarke, 2 Stark. R. 241.

<sup>6</sup> Brown v. Goodwin, Ir. Cir. Rep. 61, per Torrens, J. Trespass for seduction. The daughter was asked questions tending to impeach her reputation, whereupon the plaintiff was allowed to call witnesses to speak to her general good character.

<sup>7</sup> Post, §§ 1470—1473.

be believed upon her oath, proof that she is a reputed prostitute would go far towards raising an inference that she yielded willingly to the prisoner's embraces. General evidence, therefore, of this kind will be received, though the woman be not called as a witness, and though, if called, she be not asked, on cross-examination, any questions tending to impeach her character for chastity;<sup>1</sup> but it seems that the counsel for the defence cannot go further, and prove specific immoral acts with the prisoner, unless he has first given the prosecutrix an opportunity of denying or explaining them.<sup>2</sup> It further appears to be the law, that although the prosecutrix may be cross-examined as to particular acts of immorality with other men, she may decline to answer such questions, and if she answers them in the negative, witnesses cannot be called to contradict her.<sup>3</sup>

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<sup>1</sup> R. v. Clarke, 2 Stark. R. 241, per Holroyd, J.; R. v. Clure, Ir. Cir. R. 275, per Crampton, J.

<sup>2</sup> R. v. Cockcroft, 11 Cox, 410. See R. v. Martin, 6 C. & P. 562; R. v. Robins, 2 M. & Rob. 512; R. v. Aspinwall, per Hullock, B., cited 3 St. Ev. 952, n. c. In R. v. Hodgson, R. & R. 211, it was held that evidence of the prosecutrix having had connexion with other men was inadmissible. On one occasion the prisoner's counsel was allowed to ask the prosecutrix, with the view of *contradicting her*, whether she had not, on a day since the alleged rape, been walking in a certain street with a common prostitute, looking out for men. P. v. Barker, 3 C. & P. 589, per Park, J., after consulting Parke, J.; see also Verry v. Watkins, 7 C. & P. 308; Andrews v. Askey, 8 C. & P. 7; and R. v. Dean, 6 Cox, 23.

<sup>3</sup> R. v. Cockcroft, 11 Cox, 410, per Willes, J., & Martin, B.; R. v. Holmes and Furness, 41 L. J., M. C. 12; 12 Cox, 137; 1 Law Rep., C. C. 334, S. C., per five judges in Ct. of Cr. Ap., overruling R. v. Robins, 2 M. & Rob. 512.



A TREATISE  
ON THE  
LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH

ILLUSTRATIONS FROM AMERICAN AND OTHER FOREIGN  
LAWS.

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*From the Eighth English Edition.*

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BY

HIS HONOUR JUDGE PITT TAYLOR.

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VOL. I.  
PART II.

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## CHAPTER III

## BURTHEN OF PROOF.

§ 364.<sup>1</sup> A THIRD RULE, which governs the production of evidence, § 337 is, that, *the burthen of proof lies on the party who substantially asserts the affirmative of the issue.* This rule of convenience,—which in the Roman law is thus expressed, *Ei incumbit probatio, qui dicit, non qui negat*,<sup>2</sup> has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable;<sup>3</sup> and, moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact, should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form; for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form at his pleasure.<sup>4</sup>

§ 365. The best tests that can be devised for ascertaining on § 338 whom the burthen of proof lies, are, first to consider which party would succeed if no evidence were given on either side;<sup>5</sup> and, secondly, to examine what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the onus must lie on whichever party would fail, if either of these steps were pursued.<sup>6</sup> For instance, if, in an action brought by a landlord

<sup>1</sup> Gr. Ev. § 74 in part.

<sup>2</sup> Dig. Lib. 22, tit. 3, 1, 2; Masc. de Prob. Concl. 70, tot.; Concl. 1128, n. 10. See Tait, Ev. 1.

<sup>3</sup> Dranquet v. Prudhomme, 3 Louis. R. 83, 86.

<sup>4</sup> Soward v. Leggatt, 7 C. & P. 615, per Ld. Abinger.

<sup>5</sup> Amos v. Hughes, 1 M. & Rob. 464, per Alderson, B.; Belcher v. M'Intosh, 8 C. & P. 721, per id.; Doe v. Rowlands, 9 C. & P. 735, per Coleridge, J.; Osborn v. Thompson, 2 M. & Rob. 256, per Erskine, J.; Ridgeway v. Ewbank, 2 id. 218, per Alderson, B.; Geach v. Ingall, 14 M. & W. 97, per id.

<sup>6</sup> Mills v. Barber, 1 M. & W. 427, per Alderson, B.

against his tenant, the breach of contract assigned be that the premises were *not* kept in repair, and this allegation be traversed by the statement of defence, the plaintiff must prove his negative averment;<sup>1</sup> for though according to the grammatical construction of the issue, the affirmative lies on the defendant, yet the substantial merits of the case must be proved by the plaintiff; and if no evidence were given, or if the allegation on which issue was joined were struck from the record, the defendant would clearly be entitled to a verdict. So, if a statement of claim on a life policy,—after averring that the insurance was effected on an assertion made by the plaintiff, that the insured was not subject to habits or to attacks of illness tending to shorten life, but was in good health,—should allege that this assertion was true, and the defendant were to plead that it was false in these respects, that the insured was subject to habits and to attacks tending to shorten life, that is, to habits of intemperance and to attacks of erysipelas, and was ill at the time when the assertion was made, the burthen of proof would lie upon the plaintiff, because, to entitle him to a verdict, some evidence must be given to show that, at the time when the policy was effected, the life was insurable.<sup>2</sup>

§ 366. Again, if to an action for not executing a contract in a workmanlike manner, the defendant plead that the work was properly done,<sup>3</sup> or if a statement of claim allege that a horse sold under warranty was unsound, and this fact be traversed by the statement of defence,<sup>4</sup> the onus, in either case, will lie on the

<sup>1</sup> Soward v. Leggatt, 7 C. & P. 613; Doe v. Rowlands, 9 C. & P. 734, per Coleridge, J.; Belcher v. M'Intosh, 8 C. & P. 720, per Alderson, B.

<sup>2</sup> Huckman v. Firnie, 3 M. & W. 505, 510; Ashby v. Bates, 15 M. & W. 589; 4 Dowl. & L. 33, S. C.; Geach v. Ingall, 14 M. & W. 95; Rawlins v. Desborough, 2 M. & Rob. 70, per Ld. Denman; 8 C. & P. 321, S. C.; Craig v. Fenn, C. & Marsh. 43, per id. In Pole v. Rogers, 2 M. & Rob. 287, Tindal, C. J., held, that under similar pleadings, the defendant should begin; but this case, being distinctly opposed to the authorities stated above, cannot be supported.

<sup>3</sup> Amos v. Hughes, 1 M. & Rob. 464.

<sup>4</sup> Osborn v. Thompson, 9 C. & P. 337, per Erskine, J.; 2 M. & Rob. 254, S. C.; Cox v. Walter, cited 9 C. & P. 339, per Ld. Denman; S. P. ruled per Tindal, C. J., as cited id. 338. In Fisher v. Joyce, cited id. 338, Coleridge, J., allowed the defendant to begin, but in Doe v. Rowlands, id. 735, he confessed that this decision was wrong.

plaintiff; and the same rule will prevail in an action brought against a solicitor for not using due diligence,<sup>1</sup> or against a merchant for not loading a sufficient cargo on board a ship, pursuant to a charter-party,<sup>2</sup> or against an architect for not building houses according to a specification,<sup>3</sup> and, indeed, in every case in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in support of his claim.<sup>4</sup> So, if a damage suit be instituted in the Admiralty Division of the High Court, and the defendant, making no charge of negligence against the plaintiff, denies his averments, and pleads inevitable accident, the plaintiff on the trial must begin.<sup>5</sup>

§ 367. On this general rule, that the burthen of proof lies on the party holding the substantial affirmative, some *exceptions* have been engrafted, which should here be noticed. First, if a *disputable presumption of law*<sup>6</sup> is in favour of an affirmative allegation, the party who supports the negative must call witnesses to rebut this presumption. For instance, where a shipper was charged, in an action on the case, with having shipped goods dangerously combustible on board the plaintiff's ship, without giving notice of their nature to any officer on board, whereby the ship was burnt, it was held that, as the omission to give notice would have been a criminal neglect of duty on the part of the defendant, the law presumed that notice had been given, and threw upon the plaintiff the burthen of proving the negative.<sup>7</sup> So, where a landlord brought an action of ejectment against his tenant, on an alleged forfeiture by breach of a covenant to insure in some office in or near London, it was held that the omission to

<sup>1</sup> *Shilcock v. Passman*, 7 C. & P. 291, per Alderson, B.

<sup>2</sup> *Ridgway v. Ewbank*, 2 M. & Rob. 217, per Alderson, B.

<sup>3</sup> *Smith v. Davies*, 7 C. & P. 307, per Alderson, B.

<sup>4</sup> *Doe v. Johnson*, 7 M. & Gr. 1047, 1063, per Tindal, C. J.

<sup>5</sup> *The Benmore*, 4 Law Rep., Adm. & Ecc. 132; 43 L. J., Adm. 5, S. C.; *The Otter*, 4 Law Rep., Adm. & Ecc. 203.

<sup>6</sup> It is only with reference to disputable presumptions of law that this rule applies, for if the presumption be conclusive, no evidence can be given to rebut it; if it be merely one of fact, it can only be made through the intervention of a jury. See ante, §§ 71, 109, 214—218.

<sup>7</sup> *Williams v. E. India Co.*, 3 East, 192.

insure was a fact which the plaintiff had to prove, because the law, in favour of the party in possession, presumed that he had satisfied the terms of the covenant;<sup>1</sup> and had the landlord wished to have been relieved from the necessity of establishing this negative proof, he might easily have inserted a clause to that effect in the lease.<sup>2</sup> If, to an action on a policy of insurance effected on a ship, the underwriter plead that certain material facts, known to the assured, had been concealed from him, the burthen of proving the non-communication of these facts will, on a reply traversing the whole statement of defence, fall on the defendant; for, although the allegation contained in his statement may be negative in its terms, still, as it was the duty of the assured to make the communication,—either upon the principle that every policy is based on the supposed existence of a certain state of facts, or on the ground that insurance is a contract *uberrimæ fidei*,—some evidence should be given by the underwriter to rebut the presumption that the assured had discharged his duty. The amount of the proof required will, indeed, vary according to the circumstances of the case, and very slender evidence will often be sufficient; for, suppose a ship was known by the assured to have been burnt at the time when the assurance was effected, proof of this fact would in itself be reasonable evidence to show that it had not been communicated, because no underwriter in his senses, had he been aware of such a circumstance, would have executed the policy.<sup>3</sup>

§ 368. Again, if a party be sued on a bill of exchange alone, without any substantive claim being made in respect of the consideration, the plaintiff need not allege in his statement or prove at the trial that the bill was given for a good consideration, as the law will presume that fact in the absence of evidence to the contrary.<sup>4</sup>

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<sup>1</sup> See *Toleman v. Portbury*, 39 L. J., Q. B. 136, per Ex. Ch.

<sup>2</sup> *Doe v. Whitehead*, 8 A. & E. 571. The court there held that the defendant's refusal to produce the policy or any receipt for premium, both before the action was commenced, and also at the trial, was not sufficient proof of an omission to insure, though due notice to produce had been served.

<sup>3</sup> *Elkin v. Janson*, 13 M. & W. 655, 663, 665, per Parke and Alderson, Bs.

<sup>4</sup> 45 & 46 V., c. 61, § 30. Rules of Sup. Ct., 1883, Ord. XIX., R. 25, is as follows:—"Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burthen of proof lies (3212)"

So,—to put a somewhat more complex case,—where to an action § 340 brought by an indorsee against the acceptor of a bill of exchange, the defendant pleaded that the bill was accepted by him for the accommodation of the drawer; and was indorsed to the plaintiff without value, and the plaintiff replied that it was indorsed to him for a valuable consideration, the burthen of proving this issue was held to lie on the defendant, because the mere possession of the bill raised a *prima facie* presumption of due consideration having been given for it,<sup>1</sup> and perhaps also,—independent of this presumption,—because the defendant was bound to prove all those facts, whether affirmative or negative, which were necessary to establish his defence to the action.<sup>2</sup> So, where the defendant pleaded that he had accepted the bill for his own accommodation, and that the drawer, instead of getting it discounted for the use of the defendant, had indorsed it to a stranger, who had fraudulently indorsed it to the plaintiff, after it became due, or without consideration, and the plaintiff traversed this last allegation, the burthen of proving that the bill was overdue at the time of indorsement, or that no value was given for it by the holder, was held to have devolved on the defendant, because the plea did not contain such an allegation of fraud as would counteract the presumption arising from the possession of the instrument.<sup>3</sup>

§ 309. Where, however, the defendant's plea, after disclosing some § 341 original fraud or illegality in the transaction,—as, for instance, after stating that the bill had been obtained by fraud or duress, or had been given for gambling purposes,<sup>4</sup> or had been lost or stolen,—averred that the plaintiff held it without value, and this last fact

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upon the other side, unless the same has first been specifically denied. E.g.—Consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.”

<sup>1</sup> *Mills v. Barber*, 1 M. & W. 425; *Tyr. & Gr.* 835; 5 Dowl. 77, S. C.; *Whitaker v. Edmunds*, 1 M. & Rob. 366, per Patteson, J.; *Fitch v. Jones*, 5 E. & B. 238.

<sup>2</sup> See per Alderson, B., in *Elkin v. Janson*, 13 M. & W. 664.

<sup>3</sup> *Lewis v. Parker*, 4 A. & E. 838; *Jacob v. Hungate*, 1 M. & Rob. 445, per Parke, B.; *Brown v. Philpot*, 2 id. 285, per Ld. Denman. See, also, *Smith v. Martin*, C. & Marsh. 58.

<sup>4</sup> The fact that a note was given for a wager on the hop duty, when that duty was subject to fluctuation, was held not to render the instrument illegal within this rule, for such a wager was only a promise which the law would not enforce, *Fitch v. Jones*, 24 L. J., Q. B. 293; 5 E. & B. 238, S. C.

was traversed by the replication, the plaintiff was required to prove his traverse, because the presumption of illegality arising from an admitted fraud was held to attach to every subsequent holder, and rendered him incapable of recovering in the absence of evidence, showing under what circumstances he became possessed of the bill.<sup>1</sup> If, too, in such a case as that just put, the plaintiff, in accordance with the present practice of pleading,<sup>2</sup> were to meet the statement of defence by a general denial, and the defendant at the trial were to give evidence of fraud, the burthen of proving consideration would by such evidence be shifted on the plaintiff.<sup>3</sup> So, where in answer to an action on a promissory note brought by the indorsee against the maker, the defendant pleaded that he had presented a petition to the Court of Bankruptcy, and that the note, which had been indorsed to the plaintiff without value, had been given to the indorser in consideration of his not opposing the petition, the court held, on a replication *de injuria*, that, as soon as the illegality was proved, the onus was cast upon the plaintiff of showing that he gave value.<sup>4</sup>

§ 370. Again, if the plaintiff were to aver that a certain party § 370

<sup>1</sup> See cases cited in last four preceding notes. Also 45 & 46 V., c. 61, § 30, subs. 2; and *Bingham v. Stanley*, 2 Q. B. 117; 1 G. & D. 237, S. C., overruling *Ld. Denman's* decision at *Nisi Prius* as reported in 9 C. & P. 374. In *Elkin v. Janson*, 13 M. & W. 664, 665, Alderson, B., observes, "But take the case of fraud;—where the defendant, who is sued upon a bill of exchange, pleads that it was obtained from the drawer by fraud upon the part of A., and that A. then indorsed it to the holder; there proof of the fraud renders it highly probable that A., who has obtained the bill from the drawer by fraud, and has not been able to get anything from him, would hand it over to some one else, to be the conduit-pipe for obtaining value for it. That raises a presumption, until some answer is given, that there has been no indorsement for value, and casts upon the plaintiff, after this general evidence, the necessity of negating that presumption, and of showing that, although the above inference might fairly be made from the fact of there being fraud in the original inception of the bill, value has in fact been given for it by the indorsee." See, however, *Masters v. Barreys*, 2 C. & Kir. 715.

<sup>2</sup> Rules of Sup. Ct., 1883, Ord. XIX., R. 18; ante, §§ 302, 304.

<sup>3</sup> *Harvey v. Towers*, 6 Ex. R. 656; *Smith v. Brain*, 16 Q. B. 244; *Hogg v. Skeen*, 34 L. J., C. P. 153; 18 Com. B., N. S. 426, S. C.; *Berry v. Alderman*, 14 Com. B. 95; *Fitch v. Jones*, 24 L. J., Q. B. 293; 5 E. & B. 238, S. C.; *Mather v. Ld. Maidstone*, 26 L. J., C. P. 58; 1 Com. B., N. S. 273, S. C.; *Hall v. Featherstone*, 3 H. & N. 284.

<sup>4</sup> *Bailey v. Bidwell*, 13 M. & W. 73, overruling *Paterson v. Hardacre*, 4 Taunt. 114.



was, at a specified time, of sound mind, and this averment were traversed by the defendant, the latter would be bound to prove the negative allegation of incompetency, because every man may reasonably be presumed to be sane till the contrary is shown, and consequently, this presumption of fact, in the absence of evidence to the contrary, would equally serve the plaintiff's purpose, as though he had given express evidence of the sanity.<sup>1</sup> If, however, on the trial of such an issue, the defendant were to put in evidence an inquiry finding that the party had been lunatic prior to the transaction in question, this evidence, though not conclusive, would be sufficient to shift the burthen of proof on the plaintiff, who relied on the party's sanity.<sup>2</sup> So, if a will duly signed and attested be impugned in the Probate Division of the High Court, on the ground of the testator's insanity, the onus of proof will lie on the impugner;<sup>3</sup> but if it be shown that the testator was insane, or even subject to delusions,<sup>4</sup> at any time prior to the date of the will, or within a few years after that date, the burthen of establishing his capacity to have made the will in question will be shifted on the propounding party.<sup>5</sup>

§ 371. On the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burthen of proof, unless shifted by legislative interference, will fall in criminal proceedings on the prosecuting party, though, in order to convict, he must necessarily have recourse to negative evidence. Thus, if a statute, in the direct description of an offence, and not by way of proviso, contain negative matter,

<sup>1</sup> See *Sutton v. Sadler*, 26 L. J., C. P. 284; 3 Com. B., N. S. 87, S. C.; *Dyce Sombre v. Troup*, Deane, Ec. R. 38, 49.

<sup>2</sup> *Hassard v. Smith*, 1 R., 6 Eq. 429.

<sup>3</sup> A contrary rule prevails in Massachusetts, *Crowninshield v. Crowninshield*, 2 Gray, 524; and see *Anderson v. Gill*, 3 Macq., Sc. Cas. H. of L. 197, per *Ld. Wensleydale*; and *Smee v. Smee*, L. R., 5 P. D. 91; 49 L. J., P. D. & A. 13, S. C.

<sup>4</sup> *Smee v. Smee*, L. R., 5 P. D. 84, per *Sir J. Hannen*; 49 L. J., P. D. & A. 8, S. C.

<sup>5</sup> *Waring v. Waring*, 6 Moo. P. C. R. 341, 355—357, 368, 369, per *Ld. Brougham*; 6 Ec. & Mar. Cas. 394—396, S. C.; *Fowles v. Davidson*, 6 Ec. & Mar. Cas. 473, 474, per *Sir H. Fust*; *Grimani v. Draker*, 6 id. 420—422, 441, per *id.*; *Prinsep & E. India Co. v. Dyce Sombre*, 10 Moo. P. C. R. 232, 244—247; ante, § 197.

the indictment or information must also contain a negative allegation, which must in general be supported by *prima facie* evidence.<sup>1</sup> Such was formerly the case in prosecuting parties, either for coursing deer in inclosed grounds without the consent of the owner,<sup>2</sup> or for cutting trees without such consent;<sup>3</sup> and although the old statutes, which made the absence of consent a material element in these offences, are now repealed, the cases decided upon them will illustrate the principle under discussion. In such cases, indeed, it is not necessary to call the owner himself to prove that no consent was given by him, but the jury may infer the absence of consent from the conduct of the accused, or from other circumstances; still, some evidence must be given,—as, for instance, that the act complained of was done in a suspicious manner, or at an unusual hour, or that the defendant, when detected, endeavoured to escape, or the like,—which, in the absence of counter testimony, would afford ground for presuming that the allegation of non-consent was true.<sup>4</sup>

§ 372. The necessity of giving this *prima facie* evidence on the part of the prosecution having been found, in the great majority of criminal cases, not only useless, but highly inconvenient, the Legislature has in many instances interfered, sometimes by re-describing the offence, and omitting all mention of the negative matter,<sup>5</sup> but generally, by expressly enacting, that

<sup>1</sup> *R. v. Jarvis*, 1 East, 644, n.; *Taylor v. Humphries*, 17 Com. B., N. S. 539, 549; *Davis v. Scrase*, 4 Law Rep., C. P. 172; 38 L. J., M. C. 79, S. C. nom., *Davis v. Scrase*; *Morgan v. Hedger*, 5 Law Rep., C. P. 485; 40 L. J., M. C., 13, S. C.; *Copley v. Burton*, 5 Law Rep., C. P. 489.

<sup>2</sup> *R. v. Allen*, 1 Moo. C. C. 154; 42 G. 3, c. 107, § 1, repealed by 7 & 8 G. 4, c. 27. Other provisions, omitting all mention of consent, are now substituted by 24 & 25 V., c. 96, § 13.

<sup>3</sup> *R. v. Hazy*, 2 C. & P. 458; 6 G. 3, c. 36, repealed first by 7 & 8 G. 4, c. 27, and, secondly, by 30 & 31 V., c. 59. Other provisions, omitting all mention of consent, are now substituted by 24 & 25 V., c. 97, §§ 20, 21.

<sup>4</sup> See *R. v. Allen*, 1 Moo. C. C. 154, overruling *R. v. Rogers*, 2 Camp. 654, where it was held that the owner must be called; *R. v. Wood, Dear. & Bell*, 1, overruling *R. v. Edge*, an unreported case, said to have been decided by Martin, B.; *R. v. Hazy*, 2 C. & P. 458; *R. v. Stone*, 1 East, 639; *R. v. Hawkins*, 10 East, 211; *Frontine v. Frost*, 3 B. & P. 302; *Evans v. Birch*, 3 Camp. 10. See ante, § 113.

<sup>5</sup> See the two notes immediately preceding the last.

the *burthen of proving authority, consent, lawful excuse*, and the like, should lie on the *defendant*. Thus, if a party be indicted for being found by night, having in his possession any picklock key, crow, jack, bit, or other implement of housebreaking;<sup>1</sup> or for buying or selling at an undervalue, or for exporting or importing, counterfeit coin;<sup>2</sup> or for making, mending, or having in his possession coining tools, or for conveying such tools, or any coin or bullion, out of the Mint;<sup>3</sup> or for having in his possession any forged dies or stamps,<sup>4</sup> or any instruments or materials for making, either letter stamps,<sup>5</sup> or excise paper,<sup>6</sup> or paper used for making exchequer bills,<sup>7</sup> banks notes,<sup>8</sup> the notes of private bankers,<sup>9</sup> or foreign notes;<sup>10</sup> or for manufacturing paper similar to that used for postage covers,<sup>11</sup> or exchequer bills;<sup>12</sup> or for having in possession such paper before it has been stamped and issued for use;<sup>13</sup> or for engraving bank notes or any part thereof,<sup>14</sup> the notes of private bankers,<sup>15</sup> or foreign notes;<sup>16</sup> or for having in possession counterfeit dies for making gold and silver wares, or instruments for making such dies, or any wares of gold, silver, or base metal, having thereon forged dies;<sup>17</sup> or for having in possession hackney-coach and stage plates, or drivers' or watermen's tickets;<sup>18</sup>—in all these, and in several other cognate offences,<sup>19</sup> the defendant, by the express language of the statutes relating to them, is bound to protect himself, by showing the existence of some lawful authority or excuse.

§ 373. So, if a party be charged with applying any marks ap- § 346

<sup>1</sup> 24 & 25 V., c. 56, § 58.

<sup>2</sup> 24 & 25 V., c. 99, §§ 6, 7, 8, 14, 19.

<sup>3</sup> 24 & 25 V., c. 99, §§ 14, 24, 25. See *R. v. Harvey*, 1 Law Rep. C. C. 284;

40 L. J., M. C. 63, S. C.

<sup>4</sup> 33 & 34 V., c. 98, §§ 18, 22.

<sup>5</sup> 3 & 4 V., c. 96, § 22.

<sup>6</sup> 2 W. 4, c. 16, § 3; 11 & 12 V., c. 121, § 18.

<sup>7</sup> 24 & 25 V., c. 5, § 18; 24 & 15 V., c. 98, § 9.

<sup>8</sup> 24 & 25 V., c. 98, § 14.

<sup>9</sup> *Id.* § 18.

<sup>10</sup> *Id.* § 19.

<sup>11</sup> 3 & 4 V., c. 96, § 29.

<sup>12</sup> 24 & 25 V., c. 5, § 18; 24 & 25 V., c. 98, § 10.

<sup>13</sup> 3 & 4 V., c. 96, § 30; 24 & 25 V., c. 98, § 11; 24 & 25 V., c. 5, § 19.

<sup>14</sup> 24 & 25 V., c. 98, §§ 16, 17.

<sup>15</sup> *Id.* § 18.

<sup>16</sup> *Id.* § 19.

<sup>17</sup> 7 & 8 V., c. 22, §§ 2, 3.

<sup>18</sup> 6 & 7 V., c. 86, § 20. See 30 & 31 V., c. 134, § 17.

<sup>19</sup> See *R. v. Edmundson*, 28 L. J., M. C. 213; and 17 G. 3, c. 56, § 10, now repealed by 24 & 25 V., c. 101.

propriated to Her Majesty's stores,<sup>1</sup> or with conveying or having in his possession any such stores, when the same are reasonably suspected of being stolen or unlawfully obtained,<sup>2</sup> he must,—as soon as proof has been given, or an inference has been raised, that he has acted<sup>3</sup> “knowingly,”—either prove that he was lawfully authorised to do what he has done, or at least furnish some satisfactory evidence of the legality of his conduct.<sup>4</sup> In any prosecution, too, under the direction of the Commissioners of Customs, in respect of goods seized for non-payment of duties, or any other cause of forfeiture, or for recovering any penalty under any Act relating to the customs, if any dispute arise whether the duties of customs have been paid, or whether the goods have been lawfully imported or unshipped, or concerning the place whence such goods were brought, the proof in every such case lies on the defendant.<sup>5</sup> So, if a person be indicted for making a signal to a smuggling vessel at sea, the burthen of proving that the signal was not made for the purpose of giving illegal notice will lie upon the defendant;<sup>6</sup> and if any goods be found or seized under the customs laws, they will be deemed to be run goods, unless the owner can prove the contrary.<sup>7</sup> So, in proceedings under “The Seamen's Clothing Act, 1869,” the accused must be prepared to justify his conduct.<sup>8</sup> So, under “The Foreign Enlistment Act, 1870,” if the breach of neutrality charged relate to the delivery of a ship to one of the States at war, the burthen lies on the builder “of proving that he did not know that the ship was intended to be employed in the military or naval service of such State.” So, under “The Merchant Shipping Act, 1876,” any person, who sends, or attempts to send, or takes a ship to sea in an unseaworthy state so as to endanger life, is guilty of a misdemeanor, unless he proves that he used all reasonable means to ensure her going to sea in a seaworthy state, or that her

<sup>1</sup> 38 & 39 V., c. 25, § 4.

<sup>2</sup> § 7. See also §§ 8 & 9.

<sup>3</sup> *R. v. Wilmett*, 3 Cox, 281, per Coltman, J.; *R. v. Cohen*, 8 id. 41, per Watson, B., and Hill, J.; *R. v. Sleep, L. & Cave*, 44; 8 Cox, 472, S. C.

<sup>4</sup> *R. v. Banks*, 1 Esp. 146, per Ld. Kenyon.

<sup>5</sup> 39 & 40 V., c. 36, § 259.

<sup>6</sup> Id. § 191.

<sup>7</sup> Id. § 178.

<sup>8</sup> 32 & 33 V., c. 57, §§ 4, 5.

<sup>9</sup> 33 & 34 V., c. 90, § 9.

going to sea in an unseaworthy state was, under the circumstances, reasonable and justifiable.<sup>1</sup> So, in all legal proceedings under "The Passengers' Act, 1855," the ship in question will be taken to be within the provisions of the statute, unless proof to the contrary be adduced.<sup>2</sup> So, in any prosecution under the Act for preventing accidents by Threshing Machines, if it be shown that the machine was not duly fenced while working, the person to whom it belongs or for whom it has been used shall be deemed to have permitted such neglect, "unless he satisfy the court that he took all reasonable precautions to ensure the observance of the Act."<sup>3</sup> So, if any person be charged under the Army Act, 1881, with illegally purchasing from soldiers regimental necessities, equipment, or stores, or with illegally being in possession of any such articles, the burthen of proving that he has acted innocently will lie upon him.<sup>4</sup> So, if a man be summoned for being unlawfully in possession of venison, he must satisfy the magistrate that he came lawfully by it;<sup>5</sup> and if he be charged with knowingly and unlawfully having on his premises any tree, shrub, post, pale, rail, or the like, he must, on pain of conviction, give a satisfactory account of how he came possessed of the articles found.<sup>6</sup> Persons, too, found in possession of shipwrecked goods or offering such goods for sale, are bound to show that they have not transgressed the law in taking them.<sup>7</sup>

§ 373A. So, if proceedings be instituted against any person for § 346 having or keeping an unlicensed theatre, or for acting for hire therein, and it be proved that the theatre is used for the public performance of stage plays, the burthen of proving that the theatre is duly licensed or authorised lies on the accused.<sup>8</sup> So, in any action for a penalty under "The Public Health Act, 1875," for improperly acting as a member of a local board, the burthen of proof

<sup>1</sup> 39 & 40 V., c. 80, § 4. The indictment in such a case need not aver that the accused knew the ship was unseaworthy, or negative the use of reasonable means to insure her going to sea in a seaworthy state. *R. v. Freeman*, I. R., 9 C. L. 527.

<sup>2</sup> 18 & 19 V., c. 119, § 89.

<sup>3</sup> 41 & 42 V., c. 12, § 1.

<sup>4</sup> 44 & 45 V., c. 58, § 156, subs. 1 & 2.

<sup>5</sup> 24 & 25 V., c. 96, § 14.

<sup>6</sup> 24 & 25 V., c. 96, § 35

<sup>7</sup> *Id.* §§ 65, 66.

<sup>8</sup> 6 & 7 V., c. 68, § 17.

is in great measure shifted on to the defendant.<sup>1</sup> So, in the hosiery and silk-weaving trades, if any dispute arises between the manufacturer and the workmen respecting the alleged imperfect execution of any work, which has been delivered to the manufacturer or his agent, the work, if not produced in order to adjudication, will be deemed to have been properly executed.<sup>2</sup> So, if complaint be made that a person employed in a factory or workshop without a surgical certificate, is under the prescribed age, and the Court be of that opinion, the employer shall be liable to penalties, unless he can prove that the party employed is of the age required.<sup>3</sup> So, in any prosecution of a chimney sweeper for illegally employing a climbing boy, and in any proceeding against any person for employing a child in a dangerous performance,<sup>4</sup> the proof of the age of the person employed lies on the defendant; and on the hearing of any information for a penalty for keeping a dog without a license, the accused must prove the age of the dog if he relies on the animal being a mere puppy.<sup>5</sup> So, if a pawnbroker be charged with certain offences against "The Pawnbrokers' Act, 1872," he will be required to prove some lawful or reasonable excuse for his conduct.<sup>7</sup>

§ 374. Again, in most of the prosecutions for offences against the Bankrupt Law, the accused will be open to conviction on the sole proof of his having committed the act complained of, "unless the jury is satisfied that he had *no* intent to defraud," or, "to conceal the state of his affairs," or, "to defeat the law," as the case may be.<sup>8</sup> So, if any person be charged with having committed an offense against "The Contagious Diseases Animals' Act, 1878," the burthen of proving any "lawful authority or excuse" for his conduct will lie upon him.<sup>9</sup> So, if a consumer of gas be charged with fraudulently abstracting it, "the existence of artificial means" for altering the index to any meter, or for preventing any meter from duly registering, or for abstracting, consuming, or using gas

<sup>1</sup> 38 & 39 V., c. 55, Sch. 2, Rule 1, sub-rule 70.

<sup>2</sup> 8 & 9 V., c. 77, § 3; 8 & 9 V., c. 128, § 3

<sup>3</sup> 41 V., c. 16, § 92.

<sup>4</sup> 27 & 28 V., c. 37, § 10

<sup>5</sup> 42 & 43 V., c. 34, § 4

<sup>6</sup> 41 V., c. 15, § 19.

<sup>7</sup> 35 & 36 V., c. 93, § 23, r. 4, & § 31.

<sup>8</sup> 32 & 33 V., c. 62, §§ 11, 12; as amended by 46 & 47 V., c. 52, § 163; 35 & 36 V., c. 57, §§ 11, 12, Ir.

<sup>9</sup> 41 & 42 V., c. 74, §§ 61, 62. See *Huggins v. Ward*, 8 Law Rep., Q. B. D., 521.

when such meter is under the consumer's control, shall be "prima facie evidence that such alteration, prevention, abstraction, or consumption has been fraudulently, knowingly, and wilfully caused by the consumer."<sup>1</sup> A similar presumption of guilty knowledge is also recognised with respect to water when supplied by measure.<sup>2</sup>

§ 375. In accordance with the law as just illustrated, "The Prevention of Crimes Act, 1871,"<sup>3</sup>—after showing how minor offences against that Act may be prosecuted,—goes on to enact, in subs. 3 of § 17, that "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant, or prosecutor, or complainant."<sup>4</sup> § 346B

§ 375 and notes 3 and 4. All the enactments, referred to in this sect. and the notes, are now repealed by 47 & 48 V., c. 43, § 4, and Sched., excepting 34 & 35 V. c. 96, § 20, subs. 3; 41 & 42 V. c. 52, § 250, Ir.; and the Summary Jurisdiction Act, 1879, 42 & 43 V. c. 49, § 39, subs. 2. This last enactment is henceforth to apply to all proceedings before Courts of Summary Jurisdiction.

§ 376. In several of the instances above given, the Legislature has adopted a principle which the common law also recognises, and which may here be noticed as a *second exception* to the general rule, that the burthen of proof lies on the party who substantially alleges the affirmative. The exception is this, that where the subject matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, § 347

<sup>1</sup> 34 & 35 V., c. 41, § 38.

<sup>2</sup> 38 & 39 V., c. 55, § 60; 41 & 42 V., c. 52, § 70, Ir.

<sup>3</sup> 34 & 35 V., c. 112.

<sup>4</sup> This seems to be a favourite form of the present Parliamentary draughtsman, for it will be found in many other Acts passed in and since 1871. See The Pedlars Act, 1871, 34 & 35 V., c. 96, § 20, subs. 3; The Petroleum Act, 1871, 34 & 35 V., c. 105, § 15, subs. 5; The Infant Life Protection Act, 1872, 35 & 36 V., c. 38, § 11; The Mines Regulation Acts, 1872, 35 & 36 V., c. 76, § 63, r. 3; and c. 77, § 34, r. 3; The Licensing Act, 1872, 35 & 36 V., c. 94, § 51, r. 4; *Roberts v. Humphreys*, 8 Law Rep. Q. B. 483; 42 L. J., M. C. 147, S. C.; The Naval Artillery Volunteer Act, 1873, 36 & 37 V., c. 77, § 36; The Elementary Education Act 1873, 36 & 37 V., c. 86, § 24, r. 2; The Public Health Act, 1875, 38 & 39 V., c. 55, § 252; The Public Health, Ireland, Act, 1878, 41 & 42 V., c. 52, § 250; The Summary Jurisdiction Act, 1879, 42 & 43 V., c. 49, § 39, subs. 2; The Friendly Societies Act, 1875, 38 & 39 V., c. 60, § 33, subs. 5; The Factory and Workshop Act, 1878, 41 V., c. 16, § 91, subs. 3; The Weights and Measures Act, 1878, 41 & 42 V., c. 49, § 57, subs. 2; and The Contagious Diseases, Animals, Act, 1878, 41 & 42 V., c. 74, § 66, subs. 2.

whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour.<sup>1</sup> Thus, where an action for penalties was brought, under the old law against a person for practising as an apothecary without a certificate,<sup>2</sup> the plaintiff would, independent of this exception, have been bound to prove the want of a certificate; for first, though the allegation was in a negative form, its proof was essential to the plaintiff's case; and next, the law might fairly presume that the defendant would not transgress the provisions of a statute; still, as the defendant was peculiarly cognisant of the fact, whether or not he had obtained a certificate, and, if he had obtained one, could have no difficulty in producing it, the law, which is founded on general convenience, compelled him to do so.<sup>3</sup>

§ 377. This exception equally prevails in all civil or criminal proceedings instituted against parties for doing acts, which they are not permitted to do unless duly qualified; as for selling liquors, sporting,<sup>4</sup> exercising a trade or profession, and the like.<sup>5</sup> So, in an action for penalties against the proprietor of a theatre, for performing dramatic pieces without the written consent of the author,<sup>6</sup> the onus of proving such consent lies on the defen- § 348

<sup>1</sup> *Dickson v. Evans*, 6 T. R. 60, per Ashhurst, J. In *R. v. Turner*, 5 M. & Sel. 206, Bayley, J., says, "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative;" but in *Elkin v. Janson*, 13 M. & W. 662, Alderson, B., while commenting on that passage, observed, "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the *weight* of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side."

<sup>2</sup> Under 55 G. 3, c. 194. See, now, 21 & 22 V., c. 90, § 40.

<sup>3</sup> *Apoth. Co. v. Bentley, Ry. & M.* 159, per Abbott, C. J.

<sup>4</sup> The Act of 1 & 2 W. 4, c. 32, which relates to Game, enacts, in § 42, that "it shall not be necessary, in any proceeding against any person under that Act, to negative by evidence any certificate, licence, consent, authority, or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, licence, consent, authority, or other matter of exception or defence, shall be bound to prove the same."

<sup>5</sup> *R. v. Turner*, 5 M. & Sel. 206; *Smith v. Jeffries*, 9 Price, 257; *Harrison's case*, Paley, Conv. 45, n.; *Sheldon v. Clark*, 1 Johns. 513; *U. S. v. Hayward*, 2 Gall. 485; *Gening v. The State*, 1 McC. 573. See *Doe v. Whitehead*, 8 A. & E. 571; cited ante, § 367, where this rule was held inapplicable.

<sup>6</sup> Under 3 & 4 W. 4, c. 15, § 2.



dant.<sup>1</sup> In misprision of treason, if the treason be proved, and the knowledge of it be traced to the prisoner, he is, in strictness, bound to negative the averment of concealment, by offering proof of a discovery on his part.<sup>2</sup> The same rule is recognised in the Ecclesiastical Courts; and, therefore, if proceedings be there instituted against a clergyman for non-residence without licence or exemption, the promoter of the suit need neither allege nor prove that the defendant had not a licence, or was not resident on another benefice.<sup>3</sup>

§ 378. The rules of law relating to the burthen of proof are § 349 obviously of great importance in all legal proceedings, especially when viewed in connexion with the doctrine of presumptions; but questions respecting their application most frequently arise at *Nisi Prius*, on arguments concerning the *right to begin*.<sup>4</sup> The privilege of opening the case to the jury is frequently one of considerable advantage, as it not only enables the party enjoying it to create an impression in his favour, which it may be difficult by subsequent evidence to erase, but in the event of witnesses being called by his opponent, it secures to him also the last word; still, cases sometimes occur where a defendant goes to trial relying simply on the weakness of the plaintiff's case, and where, if called upon to begin, he will instantly be defeated.<sup>5</sup> Hence it follows, that the duty of beginning is seldom a matter of indifference, but is generally regarded as an object which it is important either to attain or to avoid, according to the circumstances. The question, therefore, is frequently discussed with much spirit; and as the principles which govern the right are difficult of application, and, moreover, are not very distinctly understood, the decisions

<sup>1</sup> *Morton v. Copeland*, 16 Com. 517.

<sup>2</sup> *R. v. Thistlewood*, 33 How. St. Tr. 691, per Abbott, C. J., in charge to the Grand Jury.

<sup>3</sup> *Bluck v. Rackman*, 5 Moo. P. C. R. 305, 314.

<sup>4</sup> On the hearing of appeals in equity the appellant always used to begin. *Williams v. Williams*, 2 Law Rep. Ch. Ap. 15.

<sup>5</sup> Best "*On Right to Begin*," 27, 28; *Edwards v. Jones*, 7 C. & P. 633. This was an action by the indorsee against the maker of a note; the plea in substance amounted to want of consideration, and the plaintiff replied, as to part of the sum claimed that he gave consideration for the note, and as to the residue, *nolle prosequi*. Held by Alderson, B., that on this issue the defendant must begin, and as he had no witness, the plaintiff had a verdict.

are alike numerous and conflicting. A lengthened examination of these decisions would be misplaced in a work of this nature, but perhaps a few general rules may be laid down, that will be found of practical value.

§ 379. The first general rule on this subject is, that *the party on whom the onus probandi lies,*<sup>1</sup> *as developed on the record, must begin.*<sup>2</sup> It has been sometimes asserted, that the right of beginning belongs to the party on whom the affirmative of the issue lies; but this assertion, if literally understood, is by no means accurate, since, as we have seen, it does not apply to cases where either the affirmative allegation is supported by a legal presumption, or the truth of the negative averment is peculiarly within the knowledge of the party who relies on it.<sup>3</sup> Indeed, the rule as stated above is subject to some *exceptions*, which it will be convenient here to notice. And, first, if the defendant will admit *at the trial* the *whole* *prima facie* case of the plaintiff, he will perhaps be entitled to begin, provided he was not bound to have made this admission by his pleading at an earlier period. For instance, if a party, claiming premises as heir-at-law of the person last in possession, brings an action to recover them against a devisee under such person's will, the defendant, as it seems, is entitled to begin, on admitting not only that the plaintiff is heir, but that the ancestor, through whom he claims, died seised of the estate.<sup>4</sup>

§ 380. But this exception will be strictly confined to cases where the defendant admits the *whole title* of the plaintiff; and, therefore, if a defendant in an action to recover land were to admit at the trial a

<sup>1</sup> As to the best tests of the *onus probandi*, see ante, § 365.

<sup>2</sup> This rule is recognised in the Probate Division of the High Court, and therefore where a husband petitioned for a restitution of conjugal rights, and the wife answered by pleading his cruelty on which issue was joined, the respondent was held entitled to begin; *Cherry v. Cherry*, 1 Swab. & Trist. 319; 28 L. J., Pr. & Mat. 36, S. C.

<sup>3</sup> Best "*On Right to Begin*," 29. See ante, §§ 367, 376.

<sup>4</sup> *Goodtitle v. Braham*, 4 T. R. 498; *Doe v. Brayne*, 5 Com. B. 670—674; *Doe v. Barnes*, 1 M. & Rob. 386, per Ld. Denman; *Doe v. Smart*, id. 476, per Gurney, B., after consulting Patteson, J. In this last case the defendant was allowed to begin, though the plaintiff, as to part of the premises, was prepared to prove that he was assignee of an outstanding term. See Rules of Sup. Ct., 1883, Ord. XXI., R. 21, cited ante, p. 292, n. <sup>1</sup>.

will under which the plaintiff claimed, and were to rely on a subsequent devise or codicil, he would not be allowed to begin; because, in such case, so far from admitting the whole title of the plaintiff, the defendant would expressly deny a most material part of it; for by setting up a second will or codicil, he would in effect assert that his opponent was not devisee at the time of the testator's decease.<sup>1</sup> So, if the defendant's title rests upon a conveyance from the ancestor,<sup>2</sup> or if he claims, even in part, under the ancestor's marriage settlement,<sup>3</sup> he cannot, by simply admitting the heirship of his opponent, and his own possession, deprive the former of his right to begin, because such an admission will not cover the entire title of the plaintiff. So, where each party claimed as heir-at-law, and the defendant was clearly the heir, if legitimate, his admission of the plaintiff's conditional title was held insufficient to give him the initiative, because the plaintiff, in order to recover, must prove his own title; and although in this particular case, the title might depend on the defendant's legitimacy, the fact of legitimacy did not constitute the direct issue.<sup>4</sup>

§ 381. Another *exception* to the rule under discussion rests upon § 353 the broad principle of public convenience and justice, and provides that the plaintiff shall begin in all actions where he seeks *substantial and unliquidated damages, though the affirmative lie upon the defendant*. This doctrine was promulgated by a majority of the judges many years back, as applicable to actions for *libel, slander, and injuries to the person*;<sup>5</sup> and the Court of Queen's Bench afterwards extended its operation to actions of covenant and assumpsit, and indeed, as it would seem, to *all actions*, where the plaintiff is seeking to recover actual damages of an *unascertained* amount.<sup>6</sup>

<sup>1</sup> Doe v. Brayne, 5 Com. B. 655; overruling Doe v. Corbett, 3 Camp. 368, and an anonymous case cited by Ld. Denman in Doe v. Barnes, 1 M. & Rob. 342.

<sup>2</sup> Doe v. Tucker, M. & M. 536, per Bolland, B.

<sup>3</sup> Doe v. Lewis, 1 C. & Kir. 122, per Maule, J.

<sup>4</sup> Doe v. Bray, M. & M. 166, per Vaughan, B.

<sup>5</sup> Carter v. Jones, 6 C. & P. 64; 1 M. & Rob. 281, S. C.; Mercer v. Whall, 5 Q. B. 462, per Ld. Denman. It deserves notice that Parke, B., never assented to this exception, but was always of opinion that "in all cases, he on whom the burthen of proof lay ought to begin."

<sup>6</sup> See Foley v. Tabor, 2 Fost. & Fin. 663.

§ 382. The case which establishes this important exception is *that of Mercer v. Whall*,<sup>1</sup> and the language of Lord Denman, in pronouncing the judgment of the court, well illustrates the subject. After observing that "the natural course would seem to be, that the plaintiff should bring his own cause of complaint before the court and jury in every case where he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the proof of such facts may entitle him,"<sup>2</sup> his Lordship proceeds thus:—"In ejectment, the defendant may entitle himself to begin, by admitting that the plaintiff must recover possession unless the defendant can establish a certain fact in answer; and if in an action for damages the damages are ascertained, and the plaintiff has a *prima facie* case on which he must recover that known amount and no more, unless the defendant proves what he has affirmed in pleading, here is a satisfactory ground for the defendant's proceeding at once to establish that fact. But if the extent of damages is not ascertained, the plaintiff is the person to ascertain it; and his doing so will have the good effect of making even the defence, in a vast majority of cases, much more easily understood for all who are intrusted with the decision."<sup>3</sup>

§ 383. This last exception does not extend to cases where the plaintiff seeks to recover a debt, or a liquidated demand in money;<sup>4</sup> because in such actions, unless a specific denial of the claim be placed on the record, the plaintiff is not required to give any evidence as to its amount. Neither does the exception apply where the damages sought to be recovered, though unliquidated, are obviously nominal,<sup>5</sup> or where they are admitted by the defendant, so far as

<sup>1</sup> 5 Q. B. 447. This was an action of covenant by a solicitor's clerk for improperly dismissing him, to which the defendant had pleaded, that the plaintiff had been guilty of misconduct in the service. The court held that the plaintiff was entitled to begin.

<sup>2</sup> 5 Q. B. 458.

<sup>3</sup> 5 Q. B. 464, 465.

<sup>4</sup> *Woodgate v. Potts*, 2 C. & Kir. 457, per Parke, B.; *Fowler v. Coster*, M. & M. 241, per Ld. Tenterden; 3 C. & P. 463, S. C.; *Bonfield v. Smith*, 2 M. & Rob. 519; Rules of Sup. Ct., 1883, Ord. XXVII., R. 2.

<sup>5</sup> *Hodges v. Holder*, 3 Camp. 366, per Bayley, J.; *Jackson v. Hesket*, 2 Stark. R. 518, per *id.*

the amount is concerned,<sup>1</sup> or where they can be ascertained by mere computation, as, for instance, where the action is brought on a bill of exchange or a promissory note;<sup>2</sup> or where the plaintiff will not say whether or not he intends to proceed for substantial damages.<sup>3</sup>

§ 384. A second general rule respecting the right to begin is, § 356  
*that if the record contains several issues, and the burthen of proving any one of them lies on the plaintiff, he is entitled to begin, provided he will undertake to give evidence upon it.*<sup>4</sup> This rule will equally prevail, though it clearly appears, as a matter of calculation, that if the defendant should eventually succeed on one of the issues which he is bound to prove, the plaintiff will recover nothing on the issue which lies upon him.<sup>5</sup> But the proviso at the end of the rule constitutes a material part of it; and, therefore, if to some special count, claiming liquidated damages, the plaintiff adds the common money counts, and the defendant, confessing and avoiding the former, specifically denies the latter, this will not entitle the plaintiff to begin, unless in fact he intends to rely on the common money counts, and to adduce evidence in support of them, for the only object of an opening is to explain to the jury the facts which are to be proved by the witnesses.<sup>6</sup>

§ 385. If several issues be joined, some of which lie on either § 357  
 party, the plaintiff may, at his option, go into the whole case in the first instance, or he may content himself with adducing evidence in support of those issues which he is bound to prove, reserving the

<sup>1</sup> *Tindall v. Baskett*, 2 Fost. & Fin. 644, per Erle, C. J.

<sup>2</sup> *Cannam v. Farmer*, 2 C. & Kir. 746; 3 Ex. R. 698, S. C.; Rules of Sup. Ct., 1883, Ord. XXXVI., R. 57.

<sup>3</sup> *Chapman v. Rawson*, 8 Q. B. 673.

<sup>4</sup> *Rawlins v. Desborough*, 2 M. & Rob. 328, per Ld. Denman.

<sup>5</sup> *Cripps v. Wells*, C. & Marsh. 489, per Rolfe, B.; recognised in *Booth v. Millns*, 15 M. & W. 669; 4 Dowl. & L. 52, S. C.

<sup>6</sup> *Smart v. Rayner*, 6 C. & P. 721, per Parke, B.; *Mills v. Oddy*, id. 728, per id., overruling *Homan v. Thompson*, id. 717; *Faith v. M'Intyre*, 7 C. & P. 44, per id.; *Oakeley v. Ooddeen*, 2 Fost. & Fin. 656, per Byles, J. See *Edge v. Hillary*, 3 C. & Kir. 43. There, to an action for goods sold, defendant pleaded, except as to £150, the general issue, and as to that sum a special plea. The plaintiff's particulars limited his demand to £150. Held by Ld. Campbell that defendant should begin.

right of rebutting his adversary's proofs, in the event of the defendant establishing a *prima facie* case with respect to the issues which lie upon him.<sup>1</sup> The latter course is the one which, in practice, is most usually adopted, and the defendant may then have a special reply on the plaintiff's fresh evidence, while the plaintiff will be entitled to the general reply on the whole case. If, however, the plaintiff at the outset thinks fit to call any evidence to repel the defendant's case, he will not be permitted to give further evidence in reply; for if such a privilege were allowed to the plaintiff, the defendant, in common justice, might claim the same, and the proceedings would run the risk of being extended to a very inconvenient length.<sup>2</sup> In one case, where the general issue and a set-off were pleaded to an action on contract, the plaintiff was permitted to prove certain debts due to him from the defendant, and to reserve the proof of the remainder of his claim till evidence in support of the set-off had been given by the defendant;<sup>3</sup> but, although the court refused a new trial in this case, it may well be doubted whether such a course would now be allowed, without the mutual consent of both parties.

§ 386. However this may be, it is tolerably clear that where there is only one issue, the onus of proving which lies on the plaintiff, he must put forth *all his evidence in the first instance*, and cannot rely on a *prima facie* case, and, after that case has been shaken by the defendant's proof, call other evidence to confirm it. Thus, in an action by the indorsee of a bill against the acceptor, where issue was raised on a plea denying the indorsement, the plaintiff was not allowed to rest his case at first on testimony given to identify the indorser's handwriting, and after evidence for the defence had been given that he was himself too poor to have discounted the bill, and

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<sup>1</sup> Formerly, when either by pleading or notice, the defence was known, the plaintiff was bound to open his whole case, *Rees v. Smith*, 2 Stark. R. 30; but this practice, having been found inconvenient, has been abandoned; *Browne v. Murray*, Ry. & M. 254, per Abbott, C. J.; *Shaw v. Beck*, 8 Ex. R. 392. See *Penn v. Jack*, 1 Law Rep., Eq. 314.

<sup>2</sup> *Browne v. Murray*, Ry. & M. 254, per Abbott, C. J.; *Sylvester v. Hall*, id. 255, n. per id.

<sup>3</sup> *Williams v. Davies*, 1 C. & M. 464.

had disclaimed all knowledge of it, to prove that in fact he had discounted the instrument.<sup>1</sup>

§ 386A. When evidence is taken by affidavit under Order XXXVIII. of the Rules of the Supreme Court, 1883, it is expressly provided by R. 27,—in accordance with the practice described in the preceding section,—that the plaintiff's affidavits in reply "shall be confined to matters *strictly in reply*." Notwithstanding the precision of this language, Vice-Chancellor Hall is reported on a recent occasion to have set the rule at nought, and to have held that a plaintiff was at liberty to refrain from overloading his case with evidence in the first instance, and might in reply bring forward additional evidence confirmatory of that originally given.<sup>2</sup>

§ 387. In deciding upon the admissibility of evidence called in § 359 reply, regard must be had to the circumstances of the individual case, and considerable latitude will necessarily be granted to the judge in the exercise of his discretion.<sup>3</sup> Thus, where a plaintiff in ejectment made out a *prima facie* case as heir-at-law, which was met by a will being proved for the defendant, he was permitted, in reply, to put in a subsequent will whereby the estates claimed were devised to himself; for although this will proved him to be entitled to the premises as devisee, and thus set up a title different from that on which he originally relied, it operated also as a revocation of the former will, and thus demolished the defendant's case.<sup>4</sup> So, in an action for negligent driving, where the plaintiff, as confirmatory evidence of the defendant's having committed the injury, had offered proof that about the time in question, the defendant was at Layton where the collision took place, and the defendant had called witnesses to show that he was then at Richmond, Lord Denman refused to exclude further witnesses, who were tendered by the

<sup>1</sup> *Jacobs v. Tarleton*, 11 Q. B. 421. See *Wright v. Wilcox*, 19 L. J., C. P. 333; 9 Com. B. 650, S. C.

<sup>2</sup> *Peacock v. Harper*, 47 L. J., Ch. 238; L. R., 7 Ch. D. 648, S. C. Sed qu.

<sup>3</sup> *Wright v. Wilcox*, 19 L. J., C. P. 333; 9 Com. B. 650, S. C.

<sup>4</sup> *Doe v. Gosley*, 2 M. & Rob. 243, per Ld. Denman. Sed qu. as to the present practice. See Rules of Sup. Ct., 1883, Ord. XXI., R. 21, and Ord. XXIII., R. 6, cited ante, § 301.

plaintiff to prove that the defendant was not at Richmond, but at Layton, when the accident occurred.<sup>1</sup> This case certainly carries the privilege of adducing evidence in reply to its extreme limit; for although the plaintiff was at liberty to disprove the abili by showing that the defendant was not at Richmond, yet when the witnesses went on to prove that he was at Layton, they not only gave evidence which ought to have been submitted to the jury in the first instance, but confirmed that which was actually given in chief, and which consequently should have been then exhausted.<sup>2</sup> Where the issue turned on the soundness of a horse, which was exhibited to the jury during the defendant's case, the plaintiff was not allowed to recall his veterinary witnesses, who had attended the view, to give their opinion respecting his soundness, these gentlemen having had an opportunity of inspecting the horse before the plaintiff's case had closed.<sup>3</sup>

§ 388. The question respecting the right to begin is a matter of practice and regulation upon which the presiding judge must exercise his discretion; and the court will not interfere with his decision, unless it be clearly proved, not only that the ruling on this point was *manifestly wrong*, but that it has occasioned substantial injustice.<sup>4</sup> It seems that the court will not grant a new trial, merely because the judge has either admitted evidence in reply, which should in strictness have been produced in support of the plaintiff's original case,<sup>5</sup> or has prevented the plaintiff from calling witnesses in anticipation of the defendant's case, provided such witnesses be subsequently examined in reply.<sup>6</sup>

<sup>1</sup> *Briggs v. Aynsworth*, 2 M. & Rob. 163.

<sup>2</sup> See note a to S. C. pp. 169, 170.

<sup>3</sup> *Osborn v. Thompson*, 2 M. & Rob. 254, per Erskine, J.

<sup>4</sup> *Brandford v. Freeman*, 5 Ex. R. 734; *Edwards v. Matthews*, 16 L. J., Ex. 291. See, also, *Burrell v. Nicholson*, 1 M. & Rob. 306, per Ld. Denman; *Bird v. Higginson*, 2 A. & E. 160; *Huckman v. Fernie*, 3 M. & W. 510, 511, 517; *Doe v. Brayne*, 5 Com. B. 655; *Booth v. Millns*, 15 M. & W. 671, n.; 4 Dowl. & L. 52, 54, n., S. C.; *Chapman v. Emden*, 9 C. & P. 717, per Coleridge, J.; *Doe v. Rowlands*, id. 736, per id.; *Mercer v. Whall*, 5 Q. B. 447; *Geach v. Ingall*, 14 M. & W. 98, 99, per Pollock, C. B.

<sup>5</sup> *Williams v. Davies*, 1 C. & M. 465; 3 Tyr. 383, S. C.; *Doe v. Bower*, 16 Q. B. 805.

<sup>6</sup> *Smith v. Marrable*, C. & Marsh. 479.



§ 389. The right to begin draws after it, both in civil and criminal proceedings, the right to *reply*, whenever the adversary adduces evidence to the jury in support of his case;<sup>1</sup> but the mere commenting on a cash-book, which has been used to refresh the memory of one of the adverse witnesses, or even a reference to parts of this book, not looked at by such witnesses, will not entitle the opposite counsel to reply;<sup>2</sup> neither will the production of a paper, which the judge has called for in order to satisfy his conscience.<sup>3</sup> If in the course of the trial it shall become necessary for the defendant to call witnesses, for the purpose of informing the judge upon a question respecting the admissibility of evidence, the plaintiff's counsel will not thereby be entitled to the last word, because the evidence, in order to give this right, must be produced to the jury.<sup>4</sup> Where several prisoners are jointly indicted, and one of them calls witnesses, the counsel for the prosecutor has a strict right to reply generally, if the charge be a joint one, and the evidence affects the prisoners generally, though, if the charges be separate, as for stealing and receiving, or the defence be a separate one, as an alibi, he should confine his remarks to the case of the party for whom witnesses have appeared.<sup>5</sup> "If the only evidence called on the part of a prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper to do so."<sup>6</sup> Whether the counsel for the plaintiff or the prosecution will be entitled to reply, if the defendant, without adducing evidence, opens new facts, is a point not yet clearly decided; but the better opinion is that no such right can be claimed, though the judge may, in a flagrant case, permit its exercise.<sup>7</sup>

<sup>1</sup> Best "*On The Right to Begin*," 85, and cases there collected.

<sup>2</sup> Pullen v. White, 3 C. & P. 434, per Best, C. J.

<sup>3</sup> Dowling v. Finigan, 1 C. & P. 587, per Best, C. J.

<sup>4</sup> Harvey v. Mitchell, 2 M. & Rob. 366, per Parke, B.; Dover v. Maestaer, 5 Esp. 96, per Ld. Ellenborough. See ante, § 23.

<sup>5</sup> R. v. Hayes, 2 M. & Rob. 155, per Parke, B., & Coltman, J.; R. v. Blackburn, 6 Cox, 339; per Talfourd & Williams, Js.; R. v. Jordan, 9 C. & P. 118, per Williams, J.; R. v. Trevelli, 15 Cox, 289, per Hawkins, J.; R. v. Kain, 15 Cox, 388, per Stephen, J.

<sup>6</sup> Resolution of the judges, 7 C. & P. 676.

<sup>7</sup> Crerar v. Sodo, M. & M. 85, per Ld. Tenterden; 3 C. & P. 10, S. C. See, in favour of the right, R. v. Horne, 20 How. St. Tr. 664; R. v. Bignold, D. & (3231)

§ 390. On the trial of *public prosecutions*, whether for felony or misdemeanor, *instituted by the Crown*, the law officers of the Crown, and, perhaps, those who represent them,<sup>1</sup> are in strictness entitled to reply, although no evidence be adduced on the part of the defendant;<sup>2</sup> but as this is a privilege, or rather a prerogative, which stands opposed to the ordinary practice of the courts, and is, emphatically, "more honoured in the breach than the observance," the true friend of justice will do well to watch with jealousy the parties who are entitled to exercise it. Mr. Horne, so long back as 1777, very properly observed, that the Attorney-General would be grievously embarrassed to produce a single argument of reason or justice on behalf of his claim;<sup>3</sup> and as the rule which precludes the counsel for the prosecution from addressing the jury in reply, when the defendant has called no witnesses, has been long thought to afford the best security against unfairness in ordinary trials, this fact raises a natural suspicion that a contrary rule may have been adopted, and may *still* be followed, in State prosecutions, for a less legitimate purpose. It is to be hoped that, ere long, this question will receive the consideration which its importance demands, and that the Legislature, by an enlightened interference, will introduce one uniform practice in the trial of political and ordinary offenders.<sup>4</sup>

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R., N. P. 59, per Abbott, C. J.; 4 D. & R. 70, S. C.; R. v. Carlile, 6 C. & P. 643, per Park, J.; Best "*On The Right to Begin*," 92—94; against it, Best, *Id.* 94—99; Faith v. M'Intyre, 7 C. & P. 46, per Parke, B.; Stephens v. Webb, 7 C. & P. 60; R. v. Abingdon, Pea. R. 236, per Ld. Kenyon; Naish v. Brown, 2 C. & Kir. 219, per Pollock, C. B.

<sup>1</sup> See, however, observations per Martin, B., in R. v. Christie, 1 Fost. & Fin. 75; 7 Cox, 506, S. C. It was there held that the privilege does not extend to the Att.-Gen. of the County Palatine. Neither does it extend to a prosecution directed by the Poor Law Board, R. v. Beckwith, 7 Cox, 505, per Byles, J. But it does apply to Post-Office Prosecutions, and to the Sol.-Gen., as well as to the Att.-Gen., R. v. Toakley, 10 Cox, 406, per Mellor, J.; R. v. Barrow, *id.* 407. With respect to the Att.-Gen. of the Prince of Wales, see Att.-Gen. of P. of Wales, v. Crossman, 4 H. & C. 568.

<sup>2</sup> Resolution of the judges, 7 C. & P. 676; R. v. Horne, 20 How. St. Tr. 664, per Ld. Mansfield; R. v. Marsden, M. & M. 439, per Ld. Tenterden. The same unjust rule prevails in the Revenue side of the Queen's Bench Div., in all cases where the Crown is concerned. M. of Chandos v. Comrs. of Inl. Rev., 6 Ex. R. 464; 2 L. M. & P. 311, S. C., nom. D. of Buckingham v. Comrs. of Inl. Rev.

<sup>3</sup> 20 How. St. Tr. 663.

<sup>4</sup> Those who wish for further information respecting the subjects discussed in this chapter are referred to Mr. Best's work "*On The Right to Begin*."

## CHAPTER IV.

## BEST EVIDENCE.

§ 391.<sup>1</sup> THE FOURTH RULE, which governs the production of § 363 evidence, requires that *the best evidence, of which the case in its nature is susceptible*, should always be presented to the jury. This rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when better evidence is withheld, it is only fair to presume, that the party has some sinister motives for not producing it, and that, if offered, his design would be frustrated.<sup>2</sup> The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence is attainable.<sup>3</sup> Thus, depositions are in general admissible only after proof that the parties who made them cannot themselves be produced.<sup>4</sup> So, a preliminary agreement, which has been followed up by the execution of a deed of conveyance, cannot be admitted as evidence to show what parcels were subsequently conveyed.<sup>5</sup> But every title by deed must be proved by the production of the deed itself, if it be within the power

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<sup>1</sup> Gr. Ev. § 82, in part.

<sup>2</sup> See per Best, C. J., in *Strother v. Barr*, 5 Bing. 151; per Holroyd, J., in *Brewster v. Sewell*, 3 B. & A. 302; per Jervia, C. J., in *Twyman v. Knowles*, 13 Com. B. 224; *Clifton v. U. S.*, 4 Howard, S. Ct. R. 247, 248, per Nelson, J.

<sup>3</sup> 1 Phil. Ev. 418; 1 St. Ev. 500; Glassf. Ev. 266—278; *Taylor v. Riggs*, 1 Pet. 591, 596; *U. S. v. Reyburn*, 6 Pet. 352, 367; *Minor v. Tillotson*, 7 Pet. 100, 101.

<sup>4</sup> B. N. P. 239.

<sup>5</sup> *Williams v. Morgan*, 15 Q. B. 782.

of the party; for this is the best evidence of which the case is susceptible; and its non-production raises a presumption that it contains some matter of defeasance. If there be duplicate originals of a deed, all must be accounted for, before secondary evidence can be given of any one.<sup>1</sup>

§ 392. Again, if an instrument, which requires attestation to give it validity,<sup>2</sup> be produced, its execution must in general be proved by calling the subscribing witness;<sup>3</sup> and if there be two such witnesses, it will not be sufficient, so long as one of them is alive, sane, free from permanent sickness, within the jurisdiction of the court, and capable of being found by diligent inquiry, to prove the signature of the other who is dead; for such evidence would merely raise *a presumption* that the deceased had witnessed all which the law requires for the due execution of the instrument; whereas the surviving witness would have been able to *give direct proof*. Such direct testimony, therefore, might fairly be considered as evidence of a better and higher nature than mere presumption arising from the proof of the witness's handwriting.<sup>4</sup>

§ 393. The rule under discussion excludes only that evidence which *itself indicates the existence of more original sources* of information; and, therefore, when there is no substitution of inferior evidence, but only a selection of weaker, instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed.<sup>5</sup> For instance, where an instrument is required to be attested by two witnesses, it is only necessary, — excepting in the case of wills relating to real estate, — to call one of them, though the other may be at hand.<sup>6</sup> Even the previous

<sup>1</sup> *Alivon v. Furnival*, 1 C. M. & R. 292, per Parke, B.

<sup>2</sup> See 17 & 18 V., c. 125, § 26; and 19 & 20 V., c. 102, § 29, Ir.

<sup>3</sup> *Bowman v. Hodgson*, 1 Law Rep., P. & D. 362; 36 L. J., Pr. & Mat. 124. S. C. Griffiths v. Griffiths, in Pr. D., 25 Oct., 1884, per Butt, J.

<sup>4</sup> *Wright v. Doe d. Tatham*, 1 A. & E. 21, 22, per Tindal, C. J.

<sup>5</sup> 1 Ph. Ev. 418. See *Alfonso v. U. S.*, 2 Story, R. 421, 426.

<sup>6</sup> *Andrew v. Motley*, 12 Com. B., N. S. 526; *Belbin v. Skeats*, 27 L. J., Pr. & Mat. 56; 1 Swab. & Trist. 148, S. C.; *Forster v. Forster*, 33 L. J., Pr. & Mat. 113; *Ansty v. Dowsing*, 2 Str. 1253; B. N. P. 264; *Andrew v. Motley*, 12 Com. B., N. S. 527, per Byles, S.; *Gresl. Ev.* 120, 122, 123.

examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor.<sup>1</sup> So, in proof or disproof of handwriting, or in proof of the contents of a letter which cannot be produced, it is not necessary to call the supposed writer.<sup>2</sup> Even where it is necessary to prove negatively that an act was done without the consent, or against the will, of another, the person whose will or consent is denied, need not, as we have seen, be himself called.<sup>3</sup>

‘ § 394.’ This rule naturally leads to the division of evidence into § 365  
PRIMARY AND SECONDARY. *Primary evidence* is what has been just mentioned as the best or highest evidence, or, in other words, it is that kind of proof which, in the eye of the law, affords the greatest certainty of the fact in question. Until it is shown that the production of this evidence is out of the party’s power, no other proof of the fact is in general admitted. All evidence falling short of this in its degree is termed *secondary*. The question whether evidence is primary or secondary has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party, in the particular cause on trial, may be placed. It is a distinction of law, and not of fact; referring only to the *quality*, and not to the *strength* of the proof. Evidence, which carries on its face no indication that better remains behind, is not secondary, but primary.

§ 395.<sup>4</sup> But though all information must, if possible, be traced § 366  
to its fountain head, yet if there be several distinct sources of information of the same fact, it is not in general necessary to

<sup>1</sup> *Wright v. Doe d. Tatham*, 1 A. & E. 3.

<sup>2</sup> *R. v. Hurley*, 2 M. & Rob. 473; *Hughes’ case*, 2 East, P. C. 1002; *M’Guire’s case*, id.; *R. v. Benson*, 2 Camp. 508; *Liebman v. Pooley*, 1 Stark. R. 167; *Bank Prosecutions*, R. & R. 378.

<sup>3</sup> *Ante*, § 371; *R. v. Hazy*, 2 C. & P. 458; *R. v. Allen*, 1 Moo. C. C. 154; *R. v. Hurley*, 2 M. & Rob. 473, where it was held that, on an indictment for forging a cheque, the party, whose name is supposed to be forged, need not be called, either to disprove the handwriting, or to show that he did not authorise any other party to use his name.

<sup>4</sup> *Gr. Ev.* § 84, in part.

<sup>5</sup> *Gr. Ev.* § 84, as to first four lines.

show that they have all been exhausted, before recourse can be had to secondary evidence with respect to one of them.<sup>1</sup> For instance, if it be requisite to prove that a collector, who is a stranger to the suit, has received certain sums of money, that fact may obviously be established by calling, either the collector himself, or the parties who paid him, and both these modes of proof are equally primary. But suppose the collector be dead; in this case the only primary evidence is the testimony of the persons from whom the money was received. Still the law does not require the production of these persons, but, on proof of the collector's death, it will admit any entries in his book acknowledging the receipt, though such entries are merely secondary evidence of the fact in issue; and if the book be in the hands of the opposite party, who, after notice, refuses to produce it, even secondary evidence of its contents will be admissible.<sup>2</sup> The distinction between this case, and that of the two subscribing witnesses to an instrument,—where, as we have seen,<sup>3</sup> proof must be given that both the witnesses are unable to be called, before evidence of the handwriting of one of them can be received,—seems to rest on this, that the attesting witnesses are either rendered necessary by statute, or at least have been solemnly chosen by the parties, as the persons on whose united testimony they wish to rely, and, consequently, so long as one of them can be called, secondary evidence respecting the other cannot be admitted.

§ 396.<sup>4</sup> The cases which most frequently call for the application of the rule now under consideration, are those which relate to the *substitution of oral for written evidence*; and the general rule of law with respect to this subject is, that the *contents of a written instrument, which is capable of being produced, must be proved by the instrument itself, and not by parol evidence.*<sup>5</sup> This rule, which

<sup>1</sup> Cutbush v. Gilbert, 4 Serg. & R. 555; U. S. v. Gibert, 2 Sumn. 19, 80, 81; 1 Ph. Ev. 421.

<sup>2</sup> Middleton v. Melton, 10 B. & C. 322, 327, 328, per Bayley & Parke, J.; Barry v. Bebbington, 4 T. R. 514.

<sup>3</sup> Ante, § 392.

<sup>4</sup> Gr. Ev. § 85, as to first three lines.

<sup>5</sup> The Queen's case, 2 B. & B. 289.

is as old as any part of the common law of England, has ever been regarded with favour, and mentioned with approbation by the judges. "I have always," said Lord Tenterden, "acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."<sup>2</sup> Lord Wynford, also, in another case observes: "I seldom pass a day in a *Nisi Prius* court without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, and too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents, unless the instrument be proved to have been lost."<sup>3</sup> One of the main reasons for the adoption of this rule is, that the court may acquire a knowledge of the whole contents of the instrument, which may have a very different effect from the statement of a part.<sup>4</sup>

§ 397. It cannot be denied that these authorities and reasons § 368 are entitled to the greatest weight, and the rule in general is undoubtedly a wise one: but those who watch its practical working must be strangely prejudiced in its favour, if they are blinded to the cruel injustice which a strict observance of it too frequently

<sup>1</sup> Gr. Ev. § 88, in part.

<sup>2</sup> *Vincent v. Cole*, M. & M. 258.

<sup>3</sup> *Strother v. Barr*, 5 Bing. 151.

<sup>4</sup> *The Queen's case*, 2 B. & B. 287.

entails upon parties, in consequence of the stamp laws.<sup>1</sup> The judges, it is true, are wont to show no great favour to stamp objections; and some years ago they promulgated a rule, that, unless the want or insufficiency of a stamp be pointed out at the earliest possible period, that is, as soon as the document is tendered in evidence, the objection will not be entertained.<sup>2</sup> This rule is of questionable policy; for although it may occasionally promote substantial justice, it has an obvious tendency to foster sharp practice. Modern legislation has grappled with the evil in a more straightforward manner, and has done much to alleviate the oppressive operation of the stamp laws, so far as the administration of justice is concerned. In the criminal courts, no objection can now be taken to the admissibility of any document in evidence for want of a sufficient stamp;<sup>3</sup> and in the civil courts an attempt has been made, as the Common Law Commissioners express it,<sup>4</sup> "to reconcile the claims of justice with the interests of the revenue, by enabling all such instruments as may be stamped after execution to be received in evidence, though unstamped, or insufficiently stamped, if the party who tenders them is prepared at the trial to pay to the officer of the court the proper duty<sup>5</sup> and penalty.<sup>6</sup>" The Rules of the

<sup>1</sup> See per *Ld. Tenterden*, in *Reid v. Batte*, M. & M. 414.

<sup>2</sup> *Robinson v. Ld. Vernon*, 7 Com. B., N. S. 235. See ante, § 309.

<sup>3</sup> 33 & 34 V., c. 97, § 17.

<sup>4</sup> 2nd Rep. p. 26.

<sup>5</sup> A document to be "duly stamped" must be stamped "in accordance with the law in force at the time when it was first executed," 33 & 34 V., c. 97, § 17; *Clarke v. Roche*, 47 L. J., Q. B. 147.

<sup>6</sup> 33 & 34 V., c. 97, § 16, enacts, that "upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, the officer, whose duty it is to read the instrument, shall call the attention of the judge to any omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds. The officer receiving the said duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the Commissioners the name or title of the cause or proceeding in which, and of the party from whom, he received the said duty and penalty, and the date and description of the instrument, and shall pay over to the Receiver-General of Inland Revenue, or to such other person as the Commissioners may appoint, the money received by him for the said duty and penalty." This section is rendered applicable to arbitration by 44 V., c. 12, § 44, subs. (a).



Supreme Court, 1883, by Ord. XXXIX., R. 8,<sup>1</sup> further provide that "a new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp;" and this provision,—which impliedly restrains a judge at Nisi Prius from reserving for the court any question respecting the sufficiency of a stamp on a document admitted by him at the trial,<sup>2</sup>—will doubtless be productive of much benefit to the suitor, by relieving him from the annoyance and cost of a second inquiry into a matter, which cannot have any possible connexion with the real question in dispute.

§ 398. Returning now to the rule, which requires the contests of § 369 a document to be proved by the document itself, if its production be possible, it will be found that<sup>3</sup> the cases on the subject may be arranged in three classes; the *first* class relating to those instruments which the law requires to be in writing; the *second*, to those contracts which the parties have put in writing; and the *third*, to all other writings, the existence or contents of which are disputed, and which are material to the issue.<sup>4</sup>

§ 399.<sup>5</sup> And, *first*, oral evidence cannot be substituted for any § 370 *instrument which the law requires to be in writing*; such as records, public and judicial documents, official informations<sup>6</sup> or examinations, deeds of conveyance of lands, wills, other than nuncupative, acknowledgements under Lord Tenterden's Act, promises to pay the debt of another person, and other writings mentioned in the Statute of Frauds. In all these cases the law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that, so long as the writing exists, and is in the power of the party. Thus, for example, parol evidence is inadmissible to

<sup>1</sup> The Irish Act, 19 & 20 V., c. 102, contains in § 37 a similar provision.

<sup>2</sup> *Siordet v. Kuczinski*, 17 Com. B. 251; *Tattersall v. Fearnley*, id. 368; *Cory v. Davis*, 14 Com. B., N. S. 370.

<sup>3</sup> Gr. Ev. § 85, in part.

<sup>4</sup> The question how far witnesses may be cross-examined as to written statements made by them without producing the writings, will be discussed hereafter. See post, § 1446, et seq.

<sup>5</sup> Gr. Ev. § 86, as to first six lines.

<sup>6</sup> *R. v. Dillon*, 14 Cox, 4.

prove at what sittings or assizes a trial at Nisi Prius came on,<sup>1</sup> or even that it took place at all; but the record, or at least the postea, must be produced.<sup>2</sup> So, the date of a party's apprehension for a particular offence cannot be shown by parol, the warrant for apprehension or committal being superior evidence.<sup>3</sup> So, whenever the testimony of a witness is required by law to be reduced into writing,—as, for instance, when it is taken by depositions, either before an Examiner of the Court, or before a magistrate on an indictable charge,—the writing becomes in all subsequent proceedings, whether civil or criminal, the best evidence of what the witness has stated, and parol proof on the subject is consequently excluded in the first instance.<sup>4</sup> So, also, parol evidence cannot be received of the statement of a prisoner before the magistrate, where the examination has, in conformity with the Act of 11 & 12 V., c. 42, in England, or the Act of 14 & 15 V., c. 93, in Ireland, been reduced into writing, and subscribed, and returned by the justice.<sup>5</sup>

§ 400. If, however, the written examination be excluded for informality,<sup>6</sup>—other than for having been taken on oath, in which case the confession is inadmissible as not having been voluntarily made,<sup>7</sup>—or if it be clearly proved<sup>8</sup> that the statement was not reduced into writing, parol evidence is admissible to show what was said by the prisoner, for such evidence is offered, not in sub-

<sup>1</sup> *Thomas v. Ansley*, 6 Esp. 80, per Ld. Ellenborough; *R. v. Page*, id. 83, per Ld. Kenyon; as explained in *Whitaker v. Whisbey*, 21 L. J., C. P. 116; 12 Com. B. 52, S. C., cited ante, § 85.

<sup>2</sup> *B. N. P.* 243; *R. v. Iles*, Hard. 118; *R. v. Browne*, M. & M. 319; 3 C. & P. 572, S. C.

<sup>3</sup> *R. v. Phillips*, R. & R. 369.

<sup>4</sup> *Leach v. Simpson*, 5 M. & W. 309; post, § 416.

<sup>5</sup> *R. v. Fearshire*, 1 Lea. 202; *R. v. Jacobs*, id. 309. See post, § 893, et seq.

<sup>6</sup> *R. v. Reed*, M. & M. 403, per Tindal, C. J.; *R. v. Christopher*, 2 C. & Kir. 994; 1 Den. 536, S. C.; post, § 416.

<sup>7</sup> *R. v. Wheeley*, 8 C. & P. 250, per Alderson, B.; *R. v. Rivers*, 7 C. & P. 177, per Park, J.

<sup>8</sup> See *Parsons v. Brown*, 3 C. & Kir. 295, where Jervis, C. J., held that the court could not, in the absence of positive evidence, presume that examinations before justices on a charge of felony were not taken down in writing, so as to let in parol evidence.

stitution of the official document, since no such document in that case exists, but as the best evidence which the circumstances admit of being produced. So, if the prisoner was examined on two occasions, or with reference to two offences, and the examination, signed by the magistrates, relates only to what occurred on one occasion,<sup>1</sup> or with respect to one offence,<sup>2</sup> the prosecutor may call any party, who can speak to statements made by the prisoner in that part of the inquiry not included in the written examination. In like manner, if a witness, having given a written deposition in a cause, has afterwards testified orally in court, parol evidence may, in the event of his death, be given of his *vivâ voce* testimony notwithstanding the existence of the deposition;<sup>3</sup> for, in this last case, as two independent sources of information exist, the party who relies on the evidence may, at his discretion, have recourse to either.

§ 401.<sup>4</sup> In the *second* place, oral proof cannot be substituted § 372 for the *written evidence of any contract which the parties have put in writing*. Here the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and in all cases of written contracts, the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction;<sup>5</sup> and consequently, in all proceedings, civil or

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<sup>1</sup> *R. v. Wilkinson*, 8 C. & P. 662, per Parke, B., and Littledale, J.; *R. v. Christopher*, 2 C. & Kir. 994; 1 Den. 536, S. C.

<sup>2</sup> *R. v. Harris*, 1 Moo. C. C. 338.

<sup>3</sup> *Tod v. E. of Winchelsea*, 3 C. & P. 387, per Id. Tenterden.

<sup>4</sup> Gr. Ev. § 87, in part.

<sup>5</sup> See *R. v. Castle Morton*, 3 B. & A. 590, per Abbott, C. J. The principles on which a document is deemed part of the essence of any transaction, and consequently the best of primary proof of it, are thus explained by Donat.—“The force of written proof consists in this: men agree to preserve by writing the remembrance of past events, of which they wish to create a memorial, either with a view of laying down a rule for their own guidance, or in order to have, in the instrument, a lasting proof of the truth of what is written. Thus contracts are written, in order to preserve the memorial of what the contracting parties have prescribed for each other to do, and to make for themselves a fixed and immutable law, as to what has been agreed on. So, testaments are written,

criminal, in which the issue depends in any degree upon the terms of a contract, the party whose witnesses show that it was reduced to writing, must either produce the instrument, or give some good reason for not doing so. Thus, for example, if in an action to recover land against an overholding tenant, or in an action for the use and occupation of real estate, it should appear, either on the direct or cross-examination of the plaintiff's witnesses, that a written contract of tenancy has been signed, the plaintiff must either produce it, or account for its absence.<sup>1</sup> So, if a landlord were to bring an action against a tenant for rent and non-repair, and it should appear that the parties had agreed by parol that the tenant should hold the premises on the terms contained in a former lease between the landlord and a stranger, a nonsuit would be directed, unless this lease could be produced.<sup>2</sup>

§ 402. The same strictness in requiring the production of the written instrument has prevailed, where the question at issue was simply what amount of rent was reserved by the landlord,<sup>3</sup> or who was the actual party to whom a demise had been made,<sup>4</sup> or under whom the tenant came into possession;<sup>5</sup> and in an action for the price of labour performed, where it appeared that the work was commenced under an agreement in writing, but the plaintiff's

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in order to preserve the remembrance of what the party, who has a right to dispose of his property, has ordained concerning it, and thereby to lay down a rule for the guidance of his heir and legatees. On the same principle are reduced into writing all sentences, judgments, edicts, ordinances and other matters, which either confer title, or have the force of law. The writing preserves unchanged the matters intrusted to it, and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves, that is, by the inspection of the originals."—See Domat's Civ. Law, Liv. 3, tit. 6, § 2, as translated in 7 *Monthly Law Mag.* p. 73.

<sup>1</sup> *Brewer v. Palmer*, 3 Esp. 213, per *Id.* Eldon; *Fenn v. Griffith*, 6 Bing. 533; 4 M. & P. 299, S. C.; *Henry v. M. of Westmeath*, Ir. Cir. R. 809, per Richards, B.; *Thunder v. Warren*, 8 Ir. Law R. 181; *Rudge v. M'Carthy*, 4 *id.* 161.

<sup>2</sup> *Turner v. Power*, 7 B. & C., 625; M. & M. 131, S. C.

<sup>3</sup> *R. v. Merthyr Tidvil*, 1 B. & Ad. 29; *Augustien v. Challis*, 1 Ex. R. 290, where Alderson, B., observes, "you may prove by parol the relation of landlord and tenant, but without the lease you cannot tell whether any rent was due."

<sup>4</sup> *R. v. Rawden*, 8 B. & C. 708; 3 M. & R. 426, S. C.

<sup>5</sup> *Doe v. Harvey*, 8 Bing. 239; 1 M. & Sc. 374, S. C.

claim was for *extra work*, it has been several times held that, in the absence of positive proof that the work in question was entirely separate from that included in the agreement, and was in fact done under a distinct order, the plaintiff was bound to produce the original document, since it might furnish evidence, not only that the items sought to be recovered were not included therein, but also of the rate of remuneration upon which the parties had agreed.<sup>1</sup> So, where an auctioneer delivered to a bidder, to whom lands were let by auction, a written paper *signed by himself*, containing the terms of the lease, the landlord was held bound, in an action for use and occupation, to produce this paper duly stamped as a memorandum of an agreement.<sup>2</sup>

§ 403. In *Whitford v. Tutin*,<sup>3</sup> the plaintiff had been employed as secretary to the committee of a charitable society, pursuant to a resolution entered in the book of the committee, of which, during his service, he had had the care. The society being afterwards dissolved, the plaintiff sued some of the members of the committee for his salary, and the court held that he was bound to produce the book under which he was engaged; for though he was no party to the original resolution, which was entered into before his appointment as secretary, yet by accepting the situation and the benefit attached to it, he must be taken to have adopted the terms contained in the resolution, and consequently was bound to produce the book to show what those terms really were. Whether in an action for an injury done to the plaintiff's reversion, his interest as reversioner may be proved by the parol testimony of the tenant, when it appears that the premises are

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<sup>1</sup> *Vincent v. Cole*, M. & M. 257, per Ld. Tenterden; 3 C. & P. 481, S. C.; *Buxton v. Cornish*, 1 Dowl. & L. 585; 12 M. & W. 426, S. C.; *Jones v. Howell*, 4 Dowl. 176; *Holbard v. Stephens*, 5 Jur. 71, Bail C., per Williams, J.; *Parton v. Cole*, 6 Jur. 370, Bail C., per Patteson, J. See *Reid v. Batte*, M. & M. 413, cited post, § 405; and *Edie v. Kingsford*, 14 Com. B. 759.

<sup>2</sup> *Ramsbottom v. Mortley*, 2 M. & Sel. 445. See *Ramsbottom v. Tunbridge*, id. 434, cited post, § 406. See, also, *Hawkins v. Warre*, 3 B. & C. 697, where Abbott, C. J., draws the distinction between papers signed by the parties or their agents, and those which are unsigned.

<sup>3</sup> 10 Bing. 395; 4 M. & Sc. 166, S. C.

occupied under a written agreement, may admit of some doubt. In one case it was held that the agreement must be produced;<sup>1</sup> but in a later case, where nominal damages only were recovered, and independent proof was given of the premises having been devised to the plaintiff, the judges of the Court of Common Pleas were equally divided upon the question whether a nonsuit should be entered, the plaintiff having omitted to produce the written agreement between the occupier and himself.<sup>2</sup>

§ 404. The fact that, in cases of this kind, the writing is in the possession of the adverse party, does not change its character; it is still the primary evidence of the contract; and its absence must be accounted for by notice to the other party to produce it, or in some other legal mode, before secondary evidence of its contents can be received. In all these cases, however, if the plaintiff can establish a *prima facie* case, without betraying the existence of a written contract relating to the subject-matter of the action, he cannot be precluded from recovering by the defendant subsequently giving evidence that the agreement was reduced into writing; but the defendant, if he means to rely on a written contract, must produce it as part of his evidence,<sup>3</sup> and in the event of its turning out to be unstamped, or insufficiently stamped, he must pay the duty and penalty. Nor, in such a case, will any material distinction be recognised in the defendant's favour, though a notice to produce the document has been served on the plaintiff.<sup>4</sup> In an action of ejectment it has even been held, that the plaintiff could not be turned round by one of his witnesses proving, on cross-examination, that an agreement, which he only knew *related in some way to the land in question*, was seen on that morning in the hands of the plaintiff's

<sup>1</sup> Cotterill v. Hobby, 4 B. & C. 465.

<sup>2</sup> Strother v. Barr, 5 Bing. 136, Best, C. J., and Burrough, J., in favour of a nonsuit; Park and Gaselee, Js., cont.; 2 M. & P. 207, S. C.

<sup>3</sup> Magnay v. Knight, 1 M. & Gr. 944; 2 Scott, N. R. 64, S. C.; Stephens v. Pinney, 8 Taunt. 327; 2 Moore, 349, S. C.; Marston v. Dean, 7 C. & P. 13; Fry v. Chapman, 5 Dowl. 265; R. v. Padstow, 4 B. & Ad. 208; 1 N. & M. 2, S. C.; Reed v. Deere, 7 B. & C. 261, 266.

<sup>4</sup> Ante, § 397.

<sup>5</sup> See cases cited in n. 3 *supra*.

solicitor, and was produced at a former trial between the same parties; for the court held that, in order to exclude parol evidence of the tenancy, it should appear that the agreement was between the same parties, and was binding at the time of the second trial; neither of which facts was proved.<sup>1</sup>

§ 405.<sup>2</sup> Where the written communication or agreement between the parties is *collateral* to the question in issue, it need not be produced. Thus, if during an employment under a written contract, a verbal order is given for separate work, the workman can perhaps recover from his employer the price of this work, without producing the original agreement, provided he can show distinctly that the items, for which he seeks remuneration, were not included therein; as, for instance, if it clearly appears, that whilst certain work was in progress in the inside of a house under a written agreement, a verbal order was given to execute some alterations or improvements on the outside.<sup>3</sup> So, if the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness, who has seen the tenant occupy, notwithstanding it appears that the occupancy was under an agreement in writing;<sup>4</sup> and where a tenant holds lands under written rules, but the length of his term is agreed on orally, the landlord need not produce these rules in an action of trespass under a plea denying his possession, because such plea only renders it necessary for the plaintiff to prove the extent of the tenant's term, which, having been agreed to by parol, does not depend upon the written rules.<sup>5</sup> The fact of partnership may also be proved by parol evidence of the acts

<sup>1</sup> Doe v. Morris, 12 East, 237.

<sup>2</sup> Gr. Ev. § 89, in part.

<sup>3</sup> Reid v. Ratte, M. & M. 413, per Id. Tenterden; commented on by Patterson, J., in Parton v. Cole, 6 Jur. 370, Bail C. See Vincent v. Cole, M. & M. 257, and cases cited ante, § 402, n. 1.

<sup>4</sup> R. v. Holy Trinity, Hull, 7 B. & C. 611; 1 M. & R. 444, S. C.; Doe v. Harvey, 8 Bing. 239, 242; 1 M. & Sc. 374, S. C.; Spiers v. Willison, 4 Cranch, 398; Dennett v. Crocker, 8 Greenl. 239, 244. See, however, the observations of Best, C. J., on the case of R. v. Holy Trinity, in Strother v. Barr, 5 Bing. 158, 159; see, also, Twynam v. Knowles, 13 Com. B., 222.

<sup>5</sup> Hey v. Moorhouse, 6 Bing. N. C. 52; 8 Scott, 156, S. C.

of the parties, without producing the deed;<sup>1</sup> and the fact that a party has agreed to sell goods on commission may be established by oral testimony, though the terms respecting the payment of the commission have been reduced into writing.<sup>2</sup>

§ 406. So where, at the time of letting some premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes;<sup>3</sup>—and where, upon a like occasion, a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over, and assented to, by the tenant, who agreed to bring a surety and sign the agreement on a future day, but omitted to do so;<sup>4</sup> and where, in order to avoid mistakes, the terms upon which a house was let, were, at the time of letting, reduced to writing by the lessor's agent, and signed by the wife of the lessee, in order to bind him; but the lessee himself was not present, and did not appear to have constituted the wife as his agent, or to have recognised her act, further than by entering upon and occupying the premises;<sup>5</sup>—and where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer, containing the terms of the letting, but this paper was never signed either by the auctioneer or by the parties;<sup>6</sup>—and where, on the occasion of hiring a servant, the master and servant went to the chief constable's clerk, who in their presence, and by their direction, took down in writing the terms of the hiring, but neither party signed the paper, nor did it appear to have been

<sup>1</sup> *Alderson v. Clay*, 1 Stark. R. 405, per Id. *Ellenborough*.

<sup>2</sup> *Whitfield v. Brand*, 16 M. & W. 282.

<sup>3</sup> *Trewhitt v. Lambert*, 10 A. & E. 470; 3 P. & D. 676, S. C. See *Drant v. Brown*, 3 B. & C. 665; 5 D. & R. 582, S. C.; and *Bethell v. Blencowe*, 3 M. & Gr. 119, where the court held that written proposals, made pending a negotiation for a tenancy, might be admitted without a stamp, as proving one step in the evidence of the contract.

<sup>4</sup> *Doe v. Cartwright*, 3 B. & A. 326. See *Hawkins v. Warre*, 3 B. & C. 690; 5 D. & R. 512, S. C.

<sup>5</sup> *R. v. St. Martin's, Leicester*, 2 A. & E. 210; 4 N. & M. 202, S. C.

<sup>6</sup> *Ramsbottom v. Tunbridge*, 2 M. & Sel. 434. See *Ramsbottom v. Mortley*, 2 M. & Sel. 445, cited ante, § 402.



read to them;<sup>1</sup>—in all these instances the court held that parol evidence was admissible, since the writings only amounted, either to mere unaccepted proposals, or to minutes capable of conveying no definite information to the court or jury, and they could not, by any sensible rule of interpretation, be construed as memoranda, which the parties themselves intended to operate as fit evidence of their several agreements.

§ 407. On the same principle it has frequently been held, that § 378 where the action is not directly upon the agreement for non-performance of its terms, but is in tort, for its conversion, or detention, or negligent loss, the plaintiff may give parol evidence, descriptive of its identity, without giving notice to the defendant to produce the document itself;<sup>2</sup> and even though the defendant be willing to produce it without notice, the plaintiff is not bound to put it in, but may leave his adversary to do so, if he think fit, as part of his case.<sup>3</sup> It has been well observed that, for the purpose of identification, no distinction can be drawn between written instruments and other articles;—between trover for a promissory note, and trover for a waggon and horses.<sup>4</sup>

§ 408. The same rule prevails in criminal cases; and, therefore, § 379 if a person be indicted for stealing a bill or other written instrument, its identity may be proved by parol evidence, though no notice to produce it has been served on the prisoner or his agent.<sup>5</sup> If, however, the indictment be for forgery, and the forged instrument be in the hands of the prisoner, the prosecutor must serve him or his solicitor with a notice to produce it, before he can offer secondary evidence of its contents.<sup>6</sup> One ground of difference

<sup>1</sup> *R. v. Wrangle*, 2 A. & E. 514. See, for other instances, *Ingram v. Lea*, 2 Camp. 521; *Dalison v. Stark*, 4 Esp. 163; *Wilson v. Bowie*, 1 C. & P. 8.

<sup>2</sup> *Scott v. Jones*, 4 Taunt. 865; *How v. Hall*, 14 East, 274; *Bucher v. Jarratt*, 3 B. & P. 143; *Read v. Gamble*, 10 A. & E. 597; *Ross v. Bruce*, 1 Day, 100; *The People v. Holbrook*, 13 Johns. 90; *M'Lean v. Hertzog*, 6 Serg. & R. 154. These cases overrule *Cowan v. Abrahams*, 1 Esp. 50.

<sup>3</sup> *Whitehead v. Scott*, 1 M. & Rob. 2, per Ld. Tenterden.

<sup>4</sup> *Jolley v. Taylor*, 1 Camp. 143, per Sir J. Mansfield.

<sup>5</sup> *R. v. Aickles*, 1 Lea. 294, 297, n. a., 300, n. a.

<sup>6</sup> *R. v. Haworth*, 4 C. & P. 254, per Parke, J.; *R. v. Fitzsimons*, 1 R., 4 C. L. 1.

between these two cases appears to be, that in the first it was always sufficient, both in the indictment and the proof, to describe in very general terms the instrument stolen, whereas in the case of forgery, the prosecutor, under the old law,<sup>1</sup> was often required to enter into a minute description of the document alleged to have been forged.<sup>2</sup> But the main reason why parol evidence is admissible in a case of larceny, though inadmissible in a case of forgery, is, that a person charged with stealing an instrument must know, from the very nature of the accusation, that he will be called upon to produce it, while an indictment for forgery furnishes no such intimation; and it will be presently seen, when the rules which regulate the serving of notices to produce are discussed,<sup>3</sup> that this is a material distinction. Indeed, it may well admit of a doubt, whether all the cases cited in this and the preceding section, wherein parol evidence has been received, do not rest on those rules, rather than on the fact that the contents of the writings were collateral to the questions in issue.

§ 400.<sup>4</sup> In the *third* place, oral evidence cannot be substituted § 380 for *any writing, the existence or contents of which are disputed*, and which is *material to the issue* between the parties, and is not merely the memorandum of some other fact. Thus, a witness cannot be asked whether certain resolutions were published in the newspapers,<sup>5</sup> neither can he be questioned as to the contents of his account-books:<sup>6</sup> but in both these cases the papers and the books, as being the best evidence, must be produced. So, the primary proof of the publication of an opera is the production of the printed music, and the fact of publication cannot be proved in the first instance by a witness who has merely seen the opera in print, or heard parts of it played in society.<sup>7</sup> So, doubts have been entertained as to whether the contents of handbills, written by dictation at a meeting of conspirators, could be proved by oral

<sup>1</sup> See, now, 24 & 25 V., c. 98, § 42, cited ante, § 291.

<sup>2</sup> See *Bucher v. Jarratt*, 3 B. & P. 146, per Chambre, J.

<sup>3</sup> Post, § 452.

<sup>4</sup> Gr. Ev. § 88, in part.

<sup>5</sup> *R. v. O'Connell*, Arm. & T. 163.

<sup>6</sup> Id. 198. See post, § 462.

<sup>7</sup> *Roosey v. Davidson*, 13 Q. B. 257. But see 10 Com. B. 696, per Jervis, C. J.

testimony.<sup>1</sup> So, the fact of a person being rated to the relief of the poor cannot be legally proved by the collector stating that such person's name was on the rate,<sup>2</sup> but either the rate-book itself,<sup>3</sup> or at least a certified or examined extract from it,<sup>4</sup> must be produced. So, a plaintiff cannot be asked on cross-examination whether his name is written in a certain book described by the questioner, unless a satisfactory reason be first given for the non-production of the book itself.<sup>5</sup>

§ 410. In stating that oral testimony cannot be substituted for § 381 any writing included in either of the three classes above mentioned, a tacit *exception* must be made in favour of the parol admissions of a party, and of his acts amounting to admissions, both of which species of evidence are always received as primary proof against himself and those claiming under him, although they relate to the contents of a deed or other instrument, which are directly in issue in the cause.<sup>6</sup> "The reason," says Mr. Baron Parke, "why such statements or acts are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a

<sup>1</sup> R. v. Thistlewood, 33 How. St. Tr. 756—759. See post, § 417.

<sup>2</sup> Justice v. Elstob, 1 Fost. & Fin. 256.

<sup>3</sup> R. v. Coppull, 2 East, 25, recognised by Patteson, J., in R. v. Staple Fitzpaine, 2 Q. B. 494. See "The Poor Rate Assessment and Collection Act, 1839," 32 & 33 V., c. 41, § 18, cited ante, § 147A.

<sup>4</sup> Justice v. Elstob, 1 Fost. & Fin. 256.

<sup>5</sup> Darby v. Ouseley, 1 H. & N. 1.

<sup>6</sup> Earle v. Picken, 5 C. & P. 542, per Parke, B.; Newhall v. Holt, 6 M. & W. 662, per id.; Slatton v. Pooley, id. 664, and cases cited in n. a, 669; Bethell v. Blencowe, 3 M. & Gr. 119; Howard v. Smith, id. 254; 3 Scott, N. R. 574, S. C.; R. v. Welch, 2 C. & Kir. 296; 1 Den. 199, S. C.; King v. Cole, 2 Ex. R. 632; R. v. Basingstoke, 14 Q. B. 611; Boulter v. Peplow, 9 Com. B. 501—504. These cases overrule Lord Tenterden's decision in Bloxam v. Elsie, 1 C. & P. 558; Ry. & M. 187, S. C. See Fox v. Waters, 12 A. & E. 43.

party himself admits to be true, may reasonably be presumed to be so.”<sup>1</sup>

§ 411. It may seem presumption to question the correctness of this reasoning and of the decisions founded upon it; but the author cannot refrain from observing that, although the admission of a party may fairly be presumed to be true, the parol evidence by which that admission is proved need by no means be so; and, indeed, such testimony is open to even greater objection than applies to the ordinary case, where secondary evidence is produced, and the best evidence is withheld.<sup>2</sup> When the admission is made in court, it may very reasonably be allowed to render needless the production of the written instrument to which it refers, because the simple question in such case will be, is the admission true? and the rational presumption is, that a man will not tell a falsehood, which is against his own interest; but when a witness is called to say that he has heard the opposite party make a certain statement with respect to the contents of a written instrument, the further question arises, was this statement really made? and to permit such parol evidence to be equally admissible, in proof of the contents of the instrument, with the production of the instrument itself, is to open a vast field for misapprehension, perjury, and fraud, which would be wholly closed, if the salutary rule of law, requiring that what is in writing should be proved by the writing itself, were here, as in other cases, to prevail. It must be remembered, that Lord Tenterden, and Mr. Justice Maule,—no mean authorities,—have emphatically expressed opinions in support of the view here suggested;<sup>3</sup> while Mr. Baron Parke himself has declared that the parol evidence of admissions may, in some cases, be quite unsatisfactory to a jury,<sup>4</sup> and that too great weight ought never to be attached to such evidence,

<sup>1</sup> *Slatterie v. Pooley*, 6 M. & W. 669.

<sup>2</sup> “According to *Slatterie v. Pooley*, what A. states as to what B., a party, has said respecting the contents of a document which B. has seen, is admissible, whilst what A. states, respecting a document which he himself has seen, is not admissible,—although in the latter case, the chance of error is single, in the former double.” Per Reporter in 9 Com. B. 501. n. c.

<sup>3</sup> *Bloxam v. Elsie*, Ry. & M. 188; *Boulter v. Peplow*, 9 Com. B. 501.

<sup>4</sup> *Slatterie v. Pooley*, 6 M. & W. 669.

since it frequently happens that the witness not only has misunderstood what the party has said, but, by unintentionally altering a few of the expressions really used, has given to the statement an effect completely at variance with what was intended.<sup>1</sup>

§ 412. Since the above observations were written, the subject § 383 has undergone much discussion in Ireland,<sup>2</sup> where the judges have not hesitated to declare their disapproval of the principles advanced in *Slatterie v. Pooley*.<sup>3</sup> "The doctrine laid down in that case," said Chief Justice Pennefather, "is a most dangerous proposition; by it a man might be deprived of an estate of 10,000*l.* per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise encumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."<sup>4</sup> The case which called forth these remarks was an action for use and occupation. At the trial, one of the plaintiff's witnesses, after proving the occupation of the premises by the defendant, acknowledged in cross-examination the existence of a written agreement; and the court held, that this agreement must be produced, though the defendant had admitted that he was tenant at a particular rent.

§ 413. Whether the doctrine propounded in *Slatterie v. Pooley* § 384 would be held to extend to records, as well as to deeds and ordinary writings, and whether it would embrace the case of a *confessio juris*, as well as that of a *confessio facti*, may admit of some doubt. In one case before Lord Ellenborough, the admission of a party that he had been discharged under the Insolvent Debtors Act, was held insufficient evidence of a valid discharge,

<sup>1</sup> Note to *Earle v. Picken*, C. & P. 542.

<sup>2</sup> *Lawless v. Queale*, 8 Ir. Law R. 382. See, also, *Ld. Gosford v. Robb*, id. 217; and *Parsons v. Purcell*, 12 id. 90.

<sup>3</sup> 6 M. & W. 664.

<sup>4</sup> *Lawless v. Queale*, 8 Ir. Law R. 385. See, also, *Henman v. Lester*, 31 L. J., C. P. 370, 371, per Byles, J.; 12 Com. B., N. S. 781, 782, S. C.

because the judicial document, on being produced, might be found irregular and void, and the party might be mistaken;<sup>1</sup> but on an indictment for bigamy it has been held that the prisoner's deliberate declaration, that he had been married in a foreign country, rendered it unnecessary to prove that the marriage had been celebrated according to the laws of that country.<sup>2</sup> So, in an action for wages, an admission by the plaintiff that his claim had been referred to an arbitrator, who had made an award against him, has been held admissible evidence on behalf of the defendant.<sup>3</sup>

§ 414. It may be further observed, with respect to this exception, § 384 that a material difference exists between proving by means of an admission the execution of an instrument requiring attestation, which is produced, and proving the party's admission, that by such instrument, which is not produced, a certain act was done; and, indeed, it still appears to be the law,—as will hereafter be shown,<sup>4</sup>—that, when an instrument, which requires attestation to give it validity,<sup>5</sup> is in court, and its execution is to be proved against a hostile party, an admission on his part of due execution, unless made with a view to the trial of that cause, is, generally,<sup>6</sup> not sufficient. This rule is founded on reasons peculiar to the class of cases to which it is applied.

§ 415.<sup>7</sup> Where the writing does not fall within either of the § 385 three classes already described, no reason exists why it should exclude oral evidence. If, therefore, a written communication be accompanied by a verbal one to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it.<sup>8</sup> So, the payment

<sup>1</sup> *Scott v. Clare*, 3 Camp. 236. See, also, *Summersett v. Adamson*, 1 Bing. 73; *Jenner v. Joliffe*, 6 Johns. 9; *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

<sup>2</sup> *R. v. Newton*, 2 M. & Rob. 503, per Wightman and Cresswell, Js.; 1 C. & Kir. 164, S. C., nom. *R. v. Simmonsto*. But see *R. v. Flaherty*, 2 C. & Kir. 782; and *R. v. Savage*, 13 Cox, 178, per Lush, J.

<sup>3</sup> *Murray v. Gregory*, 5 Ex. R. 468.

<sup>4</sup> See post, §§ 1843, 1849.

<sup>5</sup> See 17 & 18 V., c. 125, § 26; 19 & 20 V., c. 102, § 29, Ir.

<sup>6</sup> See, however, *Nagle v. Shea*, 1 R., 9 C. L. 389.

<sup>7</sup> Gr. Ev. § 90, in part.

<sup>8</sup> See ante, § 400.

of money may be proved by oral testimony, though a receipt be taken; <sup>1</sup> a verbal demand of goods is admissible in trover, though a demand in writing was made at the same time; <sup>2</sup> and the admission of a debt is provable by oral testimony, though a written promise to pay was simultaneously given. <sup>3</sup> So, the determination of an interest in land, whether freehold or copyhold, may be proved without producing, or accounting for the non-production of, the title-deeds or court rolls, by merely showing that a deceased occupier, had, while in possession, declared that his interest in the premises would expire at his death. <sup>4</sup> For,—as will presently be seen, <sup>5</sup>—all statements by a person, while in possession of property, are, after his death, in themselves primary evidence, provided they tend to cut down his interest therein. <sup>6</sup>

§ 416. Where, on a preliminary hearing of a charge, the magistrate's clerk takes down what the witness says, but neither the witness nor the magistrate signs the writing, nor does it constitute part of the depositions returned, oral evidence of what passed on that occasion is equally admissible with the clerk's note; <sup>7</sup> and the same rule will prevail, if, on the hearing of an information for a trespass in pursuit of game, <sup>8</sup> the clerk takes a note of the charge; because this is not one of those cases where the magistrate is bound to take down what the witnesses say. <sup>9</sup> So, in support of an indictment for perjury committed in a County Court, it is unnecessary to subpoena the judge to produce his notes, for he is not required by law to keep any, and the perjury may be proved by any witness who was present at the trial. <sup>10</sup> So, where the proceedings of directors, commissioners, public trustees, and the like, are entered in

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<sup>1</sup> *Rambert v. Cohen*, 4 Esp. 213; *Jacob v. Lindsay*, 1 East, 460.

<sup>2</sup> *Smith v. Young*, 4 Camp. 439, per *Ld. Ellenborough*.

<sup>3</sup> *Singleton v. Barrett*, 2 C. & J. 368.

<sup>4</sup> *Doe v. Langfield*, 16 M. & W. 497.

<sup>5</sup> Post, § 684, et seq.

<sup>6</sup> *Doe v. Langfield*, 16 M. & W. 514, per *Parke, B.*

<sup>7</sup> *Jeans v. Wheedon*, 2 M. & Rob. 486, per *Cresswell, J.*; *R. v. Christopher*, 2 C. & Kir. 994; 1 Den. 536; 4 Cox, 76, S. C.; ante, § 400.

<sup>8</sup> Under 1 & 2 W. 4, c. 32, § 30.

<sup>9</sup> *Robinson v. Vaughton*, 8 C. & P. 252, per *Alderson, B.*

<sup>10</sup> *R. v. Morgan*, 6 Cox, 107, per *Martin, B.*; *Harmer v. Bean*, 3 C. & Kir. 307, per *Parke, B.*

books, the fact that such books are rendered by statute admissible in evidence, does not exclude parol proof of what has taken place at the respective meetings.<sup>1</sup> Neither is it necessary to produce a certificate of registration, in order to prove that a joint stock company has been completely registered.<sup>2</sup> So, the fact of birth, baptism, marriage,<sup>3</sup> death or burial, may be proved by parol testimony, though a narrative or memorandum of these events may have been entered in registers, which the law requires to be kept; for the existence of contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care."<sup>4</sup>

§ 417.<sup>5</sup> On a somewhat similar ground it has been held, that in prosecutions for political offences, such as treason, conspiracy, and sedition, the *inscriptions* on flags and banners paraded in public, and the contents of *resolutions* read at a public meeting, may be proved, as being of the nature of speeches, by oral testimony;<sup>6</sup> and where a party was indicted for administering an unlawful oath, a witness was permitted to give parol evidence of the words used, though he stated his belief that the accused read the words from a paper, which he held in his hand when he administered the oath,

<sup>1</sup> *Miles v. Bough*, 3 Q. B. 845, 872; *Inglis v. Gt. North. Ry. Co.*, 1 Macq. Sc. Cas., H. of L. 112, 118, 119.

<sup>2</sup> *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432; decided under the repealed Act, 7 & 8 V., c. 110, §§ 7 & 25. See, now, 25 & 26 V., c. 89, 13 Cox, 345, S. C.

<sup>3</sup> *Lady Limerick v. Ld. Limerick*, 32 L. J., Pr. & Mat. 22; 4 Swab. & Trist. 252, S. C.

<sup>4</sup> *Evans v. Morgan*, 2 C. & J. 453; *R. v. Allison*, R. & R. 109; *Harrison v. Corp. of Southampton*, 22 L. J., Ch. 722; *R. v. Mainwaring*, 26 L. J., M. C. 10; *Dear. & Bell*, 132; 7 Cox, 192, S. C.; *Reed v. Passer*, Pea. R. 232; *St. Devereux v. Much Dew Church*, 1 W. Bl. 367; *Morris v. Miller*, id. 632; 4 Burr. 2067, S. C.; *Birt v. Barlow*, 1 Doug. 172; *Com. v. Norcross*, 9 Mass. 492; *Ellis v. Ellis*, 11 Mass. 92; *Owings v. Wyant*, 1 Har. & M'H. 393.

<sup>5</sup> Gr. Ev. § 90, in part.

<sup>6</sup> *R. v. Hunt*, 3 B. & A. 566; *Sheridan's and Kirwan's case*, 31 How. St. Tr. 673; *R. v. O'Connell*, Arm. & T. 235—237. See ante, § 409, n. <sup>1</sup>.



and no notice to produce this paper had been served on the prisoner.<sup>1</sup>

§ 418. The preceding observations have been confined to cases, § 388 where the attempt has been made to substitute oral for written evidence; but precisely the same rules operate to the *exclusion of writings which the law considers as entitled to less weight* than those which might, and, consequently, ought to be forthcoming. Thus, an original document must,—subject to some exceptions that will be presently mentioned,<sup>2</sup>—be produced at the trial, and a mere *copy*, however accurate, will not in the first instance be admissible.<sup>3</sup> If, then, it be necessary to show the contents of a manuscript which is in the possession of the opposite party, a paper, purporting to be a printed copy, cannot be received in evidence, without a notice to produce the manuscript;<sup>4</sup> neither will a duplicate writing, taken from an autograph at one impression by means of a copying machine, be regarded as an original, but the autograph itself must be produced, or its non-production to be accounted for as in ordinary cases.<sup>5</sup> Still, all printed copies struck off in one common impression, though they constitute merely secondary evidence of the contents of the paper from which they are taken, are considered as primary evidence of each other's contents; and, therefore, when the question was, whether a prisoner was acquainted with the contents of certain placards, some copies of which were traced to his possession, a copy remaining with the printer was allowed to be read in evidence for the prosecution, though no notice had been served upon the prisoner to produce the copies which had been delivered to him.<sup>6</sup> Again, on an indictment for feloniously setting fire to a house, with intent to defraud the insurers, the policy itself, being the best evidence of the fact of insurance, must be produced by the prosecutor; and recourse

<sup>1</sup> R. v. Moors, 6 East, 421, n.

<sup>2</sup> Post, § 428.

<sup>3</sup> B. N. P. 293, 294.

<sup>4</sup> R. v. Watson, 32 How. St. Tr. 82—86; 2 Stark. R. 129, S. C.

<sup>5</sup> Nodin v. Murray, 3 Camp. 228, per Ld. Ellenborough. In India, "an impression of a document made by a copying machine shall be taken without further proof to be a correct copy." Act 11 of 1855, § 35.

<sup>6</sup> R. v. Watson, 32 How. St. Tr. 82—86; 2 Stark. R. 129, S. C.

cannot be had to the books of the insurance office, even though the policy be in the defendant's possession, unless notice to produce it has been duly served upon him.<sup>1</sup>

§ 419. The memorial of a registered conveyance is also inadmissible as primary evidence against third persons, to prove the contents of the deed;<sup>2</sup> although against the party by whom the deed is registered, and those who claim under him, it can certainly be received as secondary,<sup>3</sup> if not as primary,<sup>4</sup> evidence, being considered in the light of an admission.<sup>5</sup> On one or two occasions, the memorial, or even an examined copy of the registry, has been received as secondary evidence of the contents of an indenture, not only as against parties to the deed, who have had no part in registering it, but also as against third persons; but, in all these cases, the evidence has been admitted under special circumstances, as for instance, where parties have been acting for a long period in obedience to the provisions of the supposed instrument, or where the deed has been recited or referred to in other documents admissible in the cause.<sup>6</sup> The enrolment of a lease granted by the Crown is primary evidence, because the possessions of the Crown cannot be alienated but by matter of record; and the same rule applies to leases granted by the Duke of Cornwall, on account of the identity of interest which subsists between His Royal Highness and the Crown.<sup>7</sup> § 399

§ 420. It may occasionally be a question of some nicety to determine what instrument constitutes the primary evidence of a transac- § 390

<sup>1</sup> *R. v. Doran*, 1 Esp. 127, per Ld. Kenyon, *R. v. Kitson*, 22 L. J., M. C. 118; *Pearce & D.* 187, S. C.; *R. v. Gilson*, R. & R. 138; *R. v. Ellicombe*, 5 C. & P. 522, per Littledale, J.; 1 M. & Rob. 260, S. C.

<sup>2</sup> *Molton v. Harris* 2 Esp. 549, per Ld. Kenyon.

<sup>3</sup> *Doe v. Clifford*, 2 C. & Kir. 448, 452, per Alderson B.; *D. of Devonshire v. Neill*, 2 L. R., Ir. 132, 150.

<sup>4</sup> *Boulter v. Peplow*, 9 Com. B., 502, per Maule, J. See *Brown v. Armstrong*, 1 L. R., 7 C. L. 130.

<sup>5</sup> *Wollaston v. Hakewill*, 3 M. & Gr. 297; 3 Scott, N. R. 593, S. C.

<sup>6</sup> See *Sadlier v. Biggs*, 4 H. of L. Cas. 435; *Biggs v. Sadlier*, 10 Ir. Eq. R. 522; *Peyton v. M'Dermott*, 1 Dru. & War. 198. See, also, *Collins v. Maule*, 8 C. & P. 502; *Doe v. Kilner*, 2 C. & P. 289.

<sup>7</sup> *Rowe v. Brenton*, 8 B. & C. 755—758. For other instances, see post, § 1650, et seq.

tion. Thus, where goods have been sold through the medium of a broker, it is not yet distinctly decided how far the *broker's book* is admissible in proof of the contract. On the one hand, it has been powerfully urged by many eminent judges, that this book, if duly signed by the broker, furnishes the best evidence of the agreement,<sup>1</sup> but on the other hand it has been ruled, after much consideration, and after consulting merchants, that the *bought and sold notes*, provided they agree, and are signed so as to satisfy the Statute of Frauds,<sup>2</sup> constitute the contract, and, as such, must be produced in the first instance.<sup>3</sup> However this particular point may be ultimately determined, it seems to be quite clear, that if no notes have been transmitted to the principals, recourse may be had to the signed entry in the book kept by the broker,<sup>4</sup> or, indeed, to any other memorandum made by him as agent for both parties, which is sufficient to satisfy the statute.<sup>5</sup> In one case, where the contract was made through the medium of a broker, but the note delivered to the vendor was actually *signed* by the *purchaser*, Lord Ellenborough held,—and it would seem correctly,—that this note of itself constituted the contract, though it differed materially from the note which was sent to the purchaser.<sup>6</sup> Where, however,

<sup>1</sup> *Sievwright v. Archibald*, 17 Q. B. 115, per Patteson, J., 124, per Ld. Campbell; *Heyman v. Neale*, 2 Camp. 337, per Ld. Ellenborough; *Grant v. Fletcher*, 5 B. & C. 436; 8 D. & R. 59, S. C.; *Henderson v. Barnewall*, 1 Y. & J. 387.

<sup>2</sup> *Durrell v. Evans*, 1 H. & C. 174; and 31 L. J., Ex. 337, per Ex. Ch., overruling same case, 30 L. J., Ex. 254; and S. C. nom. *Darrell v. Evans*, 6 H. & N. 660. See *Parton v. Crofts*, 16 Com. B., N. S. 11; 33 L. J., C. P. 189, S. C.; and *Thompson v. Gardiner*, L. R. 1 C. P. D. 777. In these last two cases the production of the sold note only was held sufficient to satisfy the statute.

<sup>3</sup> *Goom v. Afalo*, 6 B. & C. 117; 9 D. & R. 148, S. C.; *Thornton v. Kempster*, 5 Taunt. 786; *Thornton v. Meux*, M. & M. 43, per Abbott, C. J.; *Cumming v. Roebuck*, Holt, N. P. R. 172; *Hawes v. Forster*, 1 M. & Rob. 368, per Ld. Denman; *Townend v. Drakeford*, 1 C. & Kir. 20, per id.

<sup>4</sup> *Townend v. Drakeford*, 1 C. & Kir. 20; *Pitts v. Beckett*, 13 M. & W. 746, per Parke, B.; *Thompson v. Gardiner*, L. R., 1 C. P. D. 777.

<sup>5</sup> *Richey v. Garvey*, 10 Ir. Law R. 544. There the memorandum had been drawn up two or three days after the sale, but the court held this fact to be immaterial, the broker's authority as agent for the parties not having been revoked.

<sup>6</sup> *Rowe v. Osborne*, 1 Stark. R. 140; recognised in *Cowie v. Remfry*, 5 Moo. P. C. R. 249, 250. But see *Moore v. Campbell*, 10 Ex. R. 323, where the vendor having signed a note which differed from the one sent to him by the

the transaction was an ordinary one of bought and sold notes, signed by the broker, which substantially differed from each other, the Privy Council held that no binding contract had been effected, although the purchaser had, on objection raised by the vendor to a particular word inserted in the sold note, struck out that word, and evidenced his consent to the erasure by affixing his initials thereto.<sup>1</sup>

§ 421. Whether, in the event of a material disagreement between § 391 the bought and sold notes, the broker's book may be resorted to, is a more difficult question. On two occasions, Lord Denman appears to have considered that such a course could not be pursued;<sup>2</sup> and Lord Abinger has expressed a similar opinion, though he has carefully confined his observations to a case where it cannot be shown that the broker's book was known to the parties.<sup>3</sup> On the other hand, Lord Wensleydale appears to have entertained serious doubts upon the subject, urging that the broker would scarcely be bound by his oath and bond to enter the terms of the contracts negotiated by him in his books, and to sign those books, if the entries so made by him were not intended to have a binding effect.<sup>4</sup> The force of this reasoning is now, however, neutralised, since even London brokers are no longer bound to keep books.<sup>5</sup> Still, it is probable that the doctrine supported by Lord Wensleydale will ultimately prevail; and the more so, as the argument rejecting the broker's book, on the ground that the parties are

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purchaser's broker, the court held that the validity of that note depended upon the question of fact, whether it was intended by both parties to be the contract, or whether the vendor only intended to be bound by it, provided the purchaser would sign a corresponding note.

<sup>1</sup> *Cowie v. Remfry*, 5 Moo. P. C. R. 232. But see *Heyworth v. Knight*, 17 Com. B., N. S. 298, 310, 311, per Willes, J.

<sup>2</sup> *Townend v. Drakeford*, 1 C. & Kir. 20; *Gregson v. Ruck*, 4 Q. B. 737, 747. In these cases the question did not directly arise, as, in the first, the entry in the broker's book was unsigned, and in the last, the book does not appear to have been tendered in evidence at all.

<sup>3</sup> *Thornton v. Charles*, 2 M. & W. 809.

<sup>4</sup> *Id.* 804, 807, 808.

<sup>5</sup> 33 & 34 V., c. 60, § 2. Stockbrokers were directed to keep books by 7 G. 2, c. 8, § 9, made perpetual by 10 G. 2, c. 8; but these Acts are now repealed by 23 & 24 V., c. 28.

ignorant of its contents, appears to be entitled to little weight; for, first, there is no necessity that they should be ignorant, as either of the principals may, if he think fit, demand to see the entry of the contract; secondly, if the broker perform his duties in so negligent a manner as to subject either of the parties to loss, he is responsible to the amount of the injury sustained; and, lastly, if this argument were to prevail, it might equally be applied to almost every case, where a contract is negotiated through the medium of an agent.

§ 422. Where a party wishes to enforce a contract made through a broker, it will be sufficient for him to produce the note in his possession, and to show that the broker has been employed in the transaction by his adversary; and this latter, if he seeks to rely on any variance between the bought and sold notes, must produce, as his evidence, the one that has been handed to himself.<sup>1</sup> § 392

§ 423. The amount of variance that will render the contract nugatory cannot be expressly defined. In one case, where the bought note spoke of a brokerage of one per cent., and a deposit of fifteen per cent., and the sold note stated that the brokerage was ten shillings per cent., and omitted all mention of the deposit, Lord Denman ruled that the discrepancy was fatal, though with respect to the brokerage, one of the jury interpreted the notes as meaning that the broker should be paid by the buyer one per cent., and by the seller half per cent.<sup>2</sup> In another case, where Scotch iron was named in the bought note, and Dunlop's iron, which is Scotch iron, but not the only kind of Scotch iron, was specified in the sold note, the contract was held to be invalidated by the variance;<sup>3</sup> and the court arrived at a similar conclusion in a third case, where the sole difference between the bought and the sold notes was, that the one purported to deal with "Riga," and the § 393

<sup>1</sup> Hawes v. Foster, 1 M. & Rob. 368, per Ld. Denman.

<sup>2</sup> Townend v. Drakeford, 1 C. & Kir. 20. See Kempson v. Boyle, 34 L. J., Ex. 191, where parol evidence was admitted to explain away an apparent variance between the notes; 3 H. & C. 763, S. C.

<sup>3</sup> Sievwright v. Archibald, 17 Q. B. 103.

other with "Petersburg," hemp.<sup>1</sup> It seems, however, that a mere clerical error, or even a mistake in a name, if productive of no loss, will not invalidate the sale.<sup>2</sup>

§ 424. With respect to notarial instruments, the general rule is § 394 that a duplicate made out at any time from the original or protocol in the notarial book, is equivalent to an original drawn up at the time of the entry in the book.<sup>3</sup> If, therefore, a foreign bill of exchange be protested for non-payment, or if it be paid under protest for the honour of an indorser, the fact of the protest may be *primarily* established, not only by producing a formal instrument of protest, extended by the notary from his register at the date of the actual protest, but by putting in evidence a duplicate protest, even though it may have been drawn up after the commencement of the action, provided that the entries in the notary's book can be shown to have been made at the time when the transactions occurred.<sup>4</sup>

§ 425. The title of a person as executor or administrator might § 395 have been *primarily* proved under the old law in any one of the following ways<sup>5</sup>:—namely, by producing either the probate or letters of administration, or an exemplification or certificate thereof granted by the Ecclesiastical Court,<sup>6</sup> or the Book of Acts in the Prerogative Office which directed the grant of the probate,<sup>7</sup> or letters,<sup>8</sup> or an examined or certified copy of such book,<sup>9</sup> or, if no act book or other record were kept, even minutes of the proving of the will and sealing of probate, indorsed on the original will by the surrogate and registrar or deputy registrar of the Diocesan

<sup>1</sup> Thornton v. Kempster, 1 Marsh. 355; 5 Taunt. 786, S. C.

<sup>2</sup> Mitchell v. Lapage, Holt, N. P. R. 253. See Bold v. Rayner, 1 M. & W. 343.

<sup>3</sup> Geralopulo v. Wieler, 10 Com. B. 712, per Maule, J.

<sup>4</sup> Id. 690.

<sup>5</sup> See post, § 1589.

<sup>6</sup> Kempton v. Cross, Cas. temp. Hard. 108; B. N. P. 246; Doe v. Gunning, 7 A. & E. 244.

<sup>7</sup> Cox v. Allingham, Jac. 514, per Sir T. Plumer, M. R.

<sup>8</sup> Elden v. Keddell, 8 East, 187; De Ross Peer., 2 Coop. 542, 543.

<sup>9</sup> Davis v. Williams, 13 East, 232; Dorrett v. Meux, 23 L. J., C. P. 221; 15 Com. B. 142, S. C.; 14 & 15 V., c. 99, § 14.

Court.<sup>1</sup> Since the 11th of January, 1858,<sup>2</sup> either the Court of Probate, or the Probate Division of the High Court, has had jurisdiction over all matters testamentary; but as the statutes which established those courts respectively, and the rules and orders which regulate their proceedings, are alike almost wholly silent on the subject of evidence, it is not easy to determine with precision how much of the law just referred to remains in force. An executor or administrator, however, may doubtless still prove his title, either by producing the probate or letters, or by an exemplification thereof granted by a registrar or district registrar of the Probate Division of the High Court.<sup>3</sup>

§ 426. The rule, which determines under what head of evidence deeds executed in duplicate are to be classed, appears to be this: When two or more parts are sealed and delivered by each party,—a practice which of late years has frequently prevailed,—they are denominated *duplicate* or *triplicate originals*,<sup>4</sup> and as such are considered to be primary evidence.<sup>5</sup> When, however, each part is executed by one party only, as often occurs in the case of leases, the two instruments are called *counterparts*, and each is alternately the best evidence against the party sealing it, and those in privity with such party;<sup>6</sup> and secondary evidence of the contents of the other part.<sup>7</sup> Thus, if a landlord brings an action for rent, he produces the counterpart executed by the tenant as original evidence,<sup>8</sup> or, in

<sup>1</sup> Doe v. Mew, and Doe v. Gunning, 7 A. & E. 240; 2 N. & P. 260, 266, n., S. C.

<sup>2</sup> When the Act of 20 & 21 V., c. 77, came into operation. See Gazette of Friday, 4 Dec. 1857.

<sup>3</sup> See forms of exemplifications appended to the Rules, &c., of 1862, for the Registrars of the Court of Probate in respect of non-contentious business, Nos. 10 & 11; and similar forms appended to Rules, &c., for the District Registrars, Nos. 11 & 12.

<sup>4</sup> 2 M. & Gr. 518, b.

<sup>5</sup> See Colling v. Treweek, 6 B. & C. 398, per Bayley, J.; Brown v. Woodman, 6 C. & P. 206, per Parke, J.

<sup>6</sup> Roe v. Davis, 7 East, 363; May. of Carlisle v. Blamire, 8 East, 487; Paul v. Meek, 2 Y. & J. 116; Pearce v. Morrice, 3 B. & Ad. 396; Burleigh v. Stibbs, 5 T. R. 465; Houghton v. Koenig, 18 Com. B. 235.

<sup>7</sup> Munn v. Godbold, 3 Bing. 292; 11 Moore, 49 S. C. As secondary evidence it will be admissible, though unstamped, id. See 33 & 34 V., c. 97, § 93; and ante, § 148.

<sup>8</sup> The law in Ireland is now regulated by § 23 of the Act 23 & 24 V., c. 154, (3261)

the event of its loss, he may have recourse, either to the part sealed by himself, or to any other species of secondary proof;<sup>1</sup> but if the tenant is the person aggrieved, he must rely on the part delivered by the landlord, and that executed by himself will only be considered as secondary evidence. With respect to the stamp, the counterpart sealed by the lessor is usually deemed the original; but that which is sealed by the lessee may be described in pleading as the "indenture," though stamped as a counterpart, provided the action be brought against the lessee.<sup>2</sup> Where any discrepancy is found to exist between a lease and its counterpart, the law will presume that the lease is correct, unless it be clear that the mistake is in that instrument.<sup>3</sup>

§ 427. On one or two occasions, where it was necessary to show that the plaintiff's ancestor had exercised acts of ownership over the property in question, counterparts of leases older than the period of living memory, and found in the ancestor's muniment room, have been admitted in evidence even against strangers, though they were executed by no one but the persons named as lessees, who were not shown to have actually held under them, and though no excuse was given for not producing the original leases sealed by the ancestor.<sup>4</sup> It is difficult to reconcile these

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which enacts, that "in all actions, suits, and proceedings, proof by or on behalf of any landlord of the perfection of the counterpart of any lease shall be equivalent to proof of the perfection of the original lease; and in case it shall appear that no counterpart existed, or that the counterpart has been lost, destroyed, or mislaid, proof of a copy of the original lease or counterpart, as the case may be, shall be sufficient evidence of the contents of the lease, as against the lessee, or any person claiming from or under him."

<sup>1</sup> Doe v. Ross, 7 M. & W. 102; Hall v. Ball, 3 M. & Gr. 242; 3 Scott, N. R. 577, S. C.      <sup>2</sup> Pearce v. Morrice, 3 B. & Ad. 396.

<sup>3</sup> Burchell v. Clark, L. R., 2 C. P. D. 88; 46 L. J., C. P. 115, overruling S. C., L. R., 1 C. P. D. 602.

<sup>4</sup> Doe v. Pulman, 3 Q. B. 622; D. of Bedford v. Lopes, cited id. 623, as decided by Ld. Denman; Bristow v. Cormican, 3 App. Cas. 668, per Ld. Blackburn, in H. L. (I.); Gov. of Magdalen Hospital v. Knott, 47 L. J., Ch. 726; L. R., 8 Ch. D. 709, S. C., per Ct. of App.; Clarkson v. Woodhouse, 5 T. R. 412, n. a; 3 Doug. 189, S. C. In this last case, the distinction between counterparts and leases does not appear to have been much discussed, if taken at all.



decisions with strict principle, since the counterparts amounted, in fact, to no more than admissions by third parties that the ancestor was seised; but the judges appear to have relaxed the rule, in consequence of the acknowledged difficulty of tracing acts of ownership after the lapse of many years; and looking at the question in this light, few persons will probably feel inclined to quarrel with the doctrine as now established.

## CHAPTER V.

## SECONDARY EVIDENCE.

§ 428. In the last chapter the rule was discussed which requires § 396  
 the production of the best attainable evidence, and an attempt was  
 made to illustrate by examples the distinction between primary  
 and secondary modes of proof. It remains to be seen upon what  
 occasions *secondary evidence* will be received; and the first general  
 rule on this subject is, that *such evidence is inadmissible, until it be  
 shown that the production of primary evidence is out of the party's  
 power*. It will be convenient to discuss this rule, and the excep-  
 tions to it, as they apply, first, to documentary evidence, and, next,  
 to oral testimony; and with respect to documents, it will be found  
 that proof of their contents may be established by secondary evi-  
 dence, first, when the original writing is destroyed or lost;  
 secondly, when its production is physically impossible, or at least  
 highly inconvenient; thirdly, when the document is in the posses-  
 sion of the adverse party, who refuses, after notice, and in some  
 cases without notice, to produce it; fourthly, when it is in the  
 hands of a third party, who is not compellable by law to produce it,  
 and who, being called as a witness with a subpoena duces tecum,  
 relies upon his right to withhold it; fifthly, when the law raises a  
 strong presumption in favour of the existence of the document;  
 sixthly, when the papers are voluminous, and it is only necessary  
 to prove their general results; and lastly, when the question arises  
 upon the examination of a witness on the *voire dire*.

§ 429.<sup>1</sup> First, if the *instrument be destroyed or lost*, the party § 399  
 seeking to give secondary evidence of its contents must give some  
 evidence that the original once existed,<sup>2</sup> and must then either

<sup>1</sup> Gr. Ev. § 558, in part.

<sup>2</sup> *Doe v. Wittcomb*, 6 Ex. R. 601, 605, 606, per Ld. Campbell; S. C. in Dom.  
 Proc., 4 H. of L. Cas. 431, per Alderson, B.

prove its destruction positively, or at least presumptively, as by showing that it has been thrown aside as useless,<sup>1</sup> or he must establish its loss, by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found. What *degree of diligence* is necessary in the search cannot easily be defined, as each case must depend much on its own peculiar circumstances;<sup>2</sup> but the party is generally expected to show, that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him.<sup>3</sup> As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary inquiry addressed to the discretion of the judge,<sup>4</sup>—the party offering secondary evidence need not on ordinary occasions have made a search for the original document, as for stolen goods, nor be in a position to negative every possibility of its having been kept back.<sup>5</sup> If the document be important, and such as the owner may have an interest in keeping, or if any reason exist for suspecting that it has been fraudulently withheld, a very strict examination will properly be required; but if the paper be supposed to be of little or no value, a very slight degree of diligence will be demanded, as it will be aided by the presumption of destruction or loss, which that circumstance affords.<sup>6</sup>

§ 430. When the document belongs to the personal custody of § 400  
a particular individual, or is proved, or may be presumed, to be

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<sup>1</sup> *R. v. Johnson*, 7 East, 66; 29 How. St. Tr. 437—440, S. C.

<sup>2</sup> *Brewster v. Sewell*, 3 B. & A. 303, per Best, J.; *Gully v. Bp. of Exeter*, 4 Bing. 298. See *Pardoe v. Price*, 13 M. & W. 267; *R. v. Gordon*, 25 L. J., M. C. 19; *Pearce & D.*, 586, S. C.

<sup>3</sup> *R. v. Saffron Hill*, 22 L. J., M. C. 22; 1 E. & B. 93, S. C. See *Moriarty v. Grey*, 12 Ir. Law R., N. S. 129.

<sup>4</sup> Ante, § 23.

<sup>5</sup> *M'Gahey v. Alston*, 2 M. & W. 214, per Alderson, B., recognised per Wigram, V.-C., in *Hart v. Hart*, 1 Hare, 9.

<sup>6</sup> *Gathecole v. Miall*, 15 M. & W. 319, 322, 329, 330, per Pollock, C. B.; 335, 336, per Alderson, B.; *Brewster v. Sewell*, 3 B. & A. 299, 300, 303; *Kensington v. Inglis*, 8 East, 278; *R. v. East Fairley*, 6 D. & R. 153, per Bayley, J., *Freeman v. Arkell*, 2 B. & C. 494; 3 D. & R. 669, S. C.

in his possession, he must in general be served with a subpoena duces tecum, and be sworn to account for it;<sup>1</sup> since, so long as he is capable of being called as a witness, his declarations respecting it will in strictness be inadmissible,<sup>2</sup> and even after his death, this species of evidence, though admissible as tending to prove the diligence and extent of the search, must be received with great caution.<sup>3</sup> Still, on one occasion, where an apprentice shortly before his death had stated that his indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it, secondary evidence of its contents was received without any search having been made for it, as proof was given that the deed had not been executed in duplicate, that the master was dead, and that his executrix had declared that she knew nothing about the instrument.<sup>4</sup> This decision appears to have proceeded on the somewhat dubious ground, that if the statement of the apprentice was inadmissible, the indenture was not traced into his hands, and as the term of service had expired, no particular reason could be assigned why it should be in his custody, while, if the statement was receivable to show a possession of the deed by him, it further showed that search for it was unnecessary.<sup>5</sup> The second branch of this dilemma is unanswerable, but the first is open to much doubt; for even if the fact of the deed not being traced into the hands of the apprentice, could preclude the necessity of searching in that quarter,<sup>6</sup> it could not discharge the parties of laches, in having neither called the personal representatives of the master, nor even examined his papers. Perhaps, however, the case may best be sup-

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<sup>1</sup> See *R. v. Saffron Hill*, 22 L. J., M. C. 22; 1 E. & B. 93, S. C.

<sup>2</sup> *R. v. Denio*, 7 B. & C. 620; *R. v. Castleton*, 6 T. R. 236; *Williams v. Younghusband*, 1 Stark. R. 139; *Walker v. Lady Beauchamp*, 6 C. & P. 552, per Alderson, B.

<sup>3</sup> *R. v. Rawden*, 2 A. & E. 158 per Ld. Denman.

<sup>4</sup> *R. v. Morton*, 4 M. & Sel. 48. See *R. v. Fordingbridge*, 27 L. J., M. C. 290; E. B. & E. 678, S. C.

<sup>5</sup> Per Ld. Ellenborough, in 4 M. & Sel. 50; explained by Bayley, J., in *R. v. Denio*, 7 B. & C. 622. See *Richards v. Lewis*, 11 Com. B. 1054. In *City of Bristol v. Wait*, 6 C. & P. 591, Alderson, B., held, that, in order to let in secondary evidence of the appointment of one of the defendants as overseer, it was sufficient to show that a witness had asked him for his appointment, when he stated that he had lost it, whereupon no search was made.

<sup>6</sup> See post, § 432, n. 4.

ported, by considering that the evidence was admitted for the mere purpose of satisfying the conscience of the judge on a preliminary inquiry; and that, consequently, a looser rule was allowed to prevail than would have been applicable to the proof of the material facts.<sup>1</sup> Indeed, this distinction between evidence addressed to the judge and that submitted to the jury, has been adopted by the Court of Queen's Bench, which has gone the length of holding, that, in order to show that search has been made for a document, so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it in their custody ought to be received.<sup>2</sup>

§ 431. If the instrument ought to have been deposited in a public office, or other particular place, it will generally be deemed sufficient to have searched that place, without calling the party whose duty it was to have put it there, or any other person who may have had access to it. Thus, where it appeared that a parish indenture of apprenticeship had been given to a person since dead to take to the overseers, and a fruitless search was made for it in the parish chest, which was the proper repository for such instruments, secondary evidence was admitted, though none of the overseers were called, and no inquiry was made of the personal representative of the party, who ought to have delivered it to the parish officers.<sup>3</sup> So, where it was the duty of a paying clerk of a parish to deposit a certain cancelled cheque in a room of the workhouse, an application to the successor of this clerk for an inspection of the cheques in the room, and an ineffectual examination of several bundles, which were handed to the party searching by the successor, was deemed a sufficient search to let in secondary evidence, though no notice to produce had been served on the first clerk, he being the defendant in the cause, and though the person who succeeded him in the office was not called.<sup>4</sup> Again,

<sup>1</sup> *R. v. Kenilworth*, 2 Sess. Cas. 72, per Coleridge, J.; 7 Q. B. 652, S. C.

<sup>2</sup> *R. v. Braintree*, 28 L. J., M. C. 1; 1 E. & E. 51, S. C.; *R. v. Kenilworth*, 2 Sess. Cas. 66; 7 Q. B. 642, S. C.; *Smith v. Smith*, I. R., 10 Eq. 273.

<sup>3</sup> *R. v. Stourbridge*, 8 B. & C. 96; 2 M. & R. 43, S. C. See *Minshall v. Lloyd*, 2 M. & W. 450.

<sup>4</sup> *M'Gahey v. Alston*, 2 M. & W. 206, 212. (3287)

secondary evidence of the contents of a warrant, issued by the defendant, has been received, on proof by the high constable, who levied under it, that he had deposited it in his office, and had sought for it there in vain, though he added that the town-clerk had access to the office, and it was objected that the defendant should have been served with a notice to produce the warrant, and the town-clerk with a subpoena duces tecum.<sup>1</sup>

§ 432. It may often be difficult to ascertain what is the *proper* ? 402  
*custody* of an instrument,<sup>2</sup> and on these occasions it will be always expedient, and sometimes necessary, to search several places. Thus, where a marriage settlement, after providing a portion for younger children, and vesting a legal term in trustees to secure it, reserved an ultimate remainder to the settlor's heir, it was held, that a search among the papers of the surviving younger child was insufficient to let in secondary evidence of its contents, and that the papers of the surviving trustees, and of the heir, should also have been examined.<sup>3</sup> Again, an expired indenture of apprenticeship remains sometimes with the master, sometimes, with the apprentice; but as the apprentice appears to have the greatest interest in its preservation,<sup>4</sup> stricter inquiry should be made of him than of the master, though in the absence of positive proof respecting the possession, caution would suggest, what strict law might not require,<sup>5</sup> a search among the papers of both. The lessor and the lessee appear to be equally entitled to the custody of an expired lease; for, whether the term has come to an end by efflux of time or by forfeiture, the lessee, for a time at least, will have a right to keep the deed, since he may have occasion to use it in an action of covenant against the lessor; but, after a considerable interval, it will frequently be found in the landlord's possession, as constituting one of the muniments of his title.<sup>6</sup> Under these circumstances, prudence dictates an applica-

<sup>1</sup> Fernley v. Worthington, 1 M. & Gr. 491.

<sup>2</sup> As to this see post, §§ 659—664.

<sup>3</sup> Cruise v. Clancy, 6 Ir. Eq. R. 552, 556, per Sugden, C.; Richards v. Lewis, 11 Com. B. 1035. <sup>4</sup> See Hall v. Ball, 3 M. & Gr. 247.

<sup>5</sup> R. v. Hinckley, 32 L. J., M. C. 158; 3 B. & S. 885, S. C.

<sup>6</sup> Hall v. Ball, 3 M. & Gr. 242, 253; 3 Scott, N. R. 577, S. C.; Plaxton v. (3268)

tion to both parties, whenever it may be necessary to prove the loss of such an instrument, though it has never been expressly decided that a search among the muniments of the lessor alone would not let in secondary evidence; and Mr. Justice Bayley, on one occasion, seems to have thought that an examination of the lessee's papers would not be absolutely necessary.<sup>1</sup>

§ 433. The legal custody of a document appointing an overseer § 403 is in that officer, he being the person most interested in it, and requiring its production as a sanction for those acts which he may be called upon to do under its authority. In the absence, therefore, of proof that the parish officers have the actual custody of such an instrument, it will not suffice to give them notice to produce it, but before secondary evidence can be received it will be necessary to call the overseer himself.<sup>2</sup> In a case before Vice-Chancellor Wigram, it appeared that a solicitor, who had prepared an agreement between the plaintiff and defendant, had sent it after execution to the defendant by his clerk. This clerk was not called, having quitted the service of the solicitor a long time back; but the defendant's clerk stated that he had searched for the deed in his counting-house, where the transactions to which it referred were all carried on, and where books containing entries relating to these transactions were kept. His Honour, on this state of facts, expressed no opinion as to the effect of the absence of the solicitor's clerk, but referred the case back to the Master, in order that a further search might be made at the defendant's private residence, since it did not appear that his clerk, who had been actively concerned in the transactions in question, had ever seen the deed at the counting-house.<sup>3</sup>

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Dare 10 B. & C. 77; 5 M. & R. 1, S. C., *Elworthy v. Sandford*, 34 L. J., Ex. 42; 3 H. & C. 330, S. C.; *R. v. North Redburn*, Cald. 452, per Buller, J.; *Doe v. Keeling*, 11 Q. B. 884.

<sup>1</sup> *Brewster v. Sewell*, 3 B. & A. 301, 302; *Hall v. Ball*, 3 M. & Gr. 247; per Erskine, J.

<sup>2</sup> *R. v. Stoke Golding*, 1 B. & A. 173, 176.

<sup>3</sup> *Hart v. Hart*, 1 Hare, 1. In *Bligh v. Wellesley*, 2 C. & P. 400, a witness stated that he had in vain searched for some papers in a box, in which he thought he had put them, but that he still fancied they were somewhere in his possession, though he had not looked elsewhere for them. Held insufficient, per Best, C. J.

§ 434. If the party entitled to the custody of a document be *dead*, inquiries should generally be made of his personal representatives, and if the document relate to real estate, of the heir-at-law also ; but these steps will not be necessary, should it appear that another party is in possession of the papers of the deceased. Where, therefore, the master of an apprentice, being possessed of the indenture, failed, and an attorney took the management of the affairs, and the custody of his papers, a search among these papers by the attorney, after the master's death, was held sufficient to let in secondary evidence of the deed of apprenticeship, though no inquiries had been made of the master's widow.<sup>1</sup> § 404

§ 435. The law does not require that the search should have been *recent*, or made for the *purposes of the cause*; and therefore, where it was made amongst the proper papers three years before the trial, this was held sufficient; though it certainly would have been more satisfactory had the papers been again examined.<sup>2</sup> If the instrument were executed in duplicate, or triplicate, &c., the loss of all the parts must be proved, in order to let in secondary evidence of the contents ;<sup>3</sup> and, in all cases, before such evidence will be admissible, it must be shown that the original instrument was duly executed, and was otherwise genuine.<sup>4</sup> If the instrument were of such a nature as to have required attestation,<sup>5</sup> the attesting witness must, if known, be called, or in the event of his death, his handwriting must be proved, precisely in the same manner as if the deed itself had been produced ; though, if it cannot be discovered who the attesting witness was, this strictness of proof will, from necessity, be waived. In the absence of evidence to the contrary, the court will presume that the instrument was duly stamped.<sup>6</sup> § 405

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<sup>1</sup> R. v. Piddlehinton, 3 B. & Ad. 400.

<sup>2</sup> Fitz v. Rabbits, 2 M. & Rob. 60.

<sup>3</sup> R. v. Castleton, 6 T. R. 236 ; B. N. P. 254 ; Alivon v. Furnival, 1 C. M. & R. 292. See ante, § 391.

<sup>4</sup> Goodier v. Lake, 1 Atk. 446 ; R. v. Culpepper, Skin. 673 ; Doe v. Whitefoot, 8 C. & P. 270 ; Jackson v. Frier, 16 Johns. 196 ; Kimball v. Morrell, 4 Greenl. 368.

<sup>5</sup> See 17 & 18 V., c. 125, § 26 ; and 19 & 20 V., c. 102, § 29, Ir.

<sup>6</sup> Ante, § 148.



§ 436. The question has often been mooted in the Court of Probate as to how far the judge is authorised to grant probate, where the will itself has, after the death of the testator, been irretrievably lost or destroyed; and the decisions go thus far, that, if the *substance* of the will can be distinctly ascertained, either by the original instructions, or by a copy of the will, or even by the recollection of witnesses who have heard it read, probate may be granted of a copy embodying such substance.<sup>1</sup> On one remarkable occasion the contents, or rather, a large portion of the contents, of a lost will, were allowed to be proved by the testimony of a single interested witness, whose veracity and competency were unimpeached; and in that case probate was granted to the extent of the proof.<sup>2</sup> In all cases, however, of this nature, it is obviously necessary that the jurisdiction of the court should be exercised with the greatest possible caution; and the judge will scarcely feel justified in acting on the evidence, unless it be of the most cogent and irrefragable character, not only free from suspicion in its sources, but exact and certain in its conclusions.<sup>3</sup>

§ 437. Notwithstanding the rule, which in general enables parties to prove, by secondary evidence, the contents of documents lost or destroyed, on some occasions it was necessary, prior to the year 1854, to produce the written instruments themselves. Thus, no action at law could be sustained on a *lost bill of exchange*, promissory-note, or cheque, or on the respective considerations, provided the instrument had been originally drawn payable to order, or bearer, and provided the fact of the loss had been specially pleaded.<sup>4</sup>

<sup>1</sup> Wharram v. Wharram, 33 L. J., Pr. & Mat. 75; 3 Swab. & Trist. 301, S. C.; Podmore v. Whetton, 33 L. J., Pr. & Mat. 143; 3 Swab. & Trist. 449, S. C.; Moore v. Whitehouse, 34 L. J., Pr. & Mat. 31; In re Body, id. 55; In re Barber, 36 id. 19; Wood v. Wood, id. 34; Finch v. Finch, id. 78; 1 Law Rep., P. & D. 371, S. C.; Burls v. Burls, 36 L. J., Pr. & Mat. 125; 1 Law Rep., P. & D. 472, S. C.; In re Callan, I. R., 9 Eq. 484; Mahood v. Mahood, I. R., 8 Eq. 359. See post, § 550.

<sup>2</sup> Sugden v. Ld. St. Leonards, L. R., 1 P. D. 154; 45 L. J., P. D. & A. 1 & 49, S. C. See also Gouldstone v. Woodward, 29 Oct., 1884, in Pr. D., per Butt, J. Sed. qu.

<sup>3</sup> Cases in last note but one.

<sup>4</sup> Ramuz v. Crowe, 1 Ex R. 167; Clay v. Crowe, 8 Ex. R. 295; Crowe v. Clay, 9 Ex. R. 604, S. C. in Ex. Ch.; Hansard v. Robinson, 7 B. & C. 90; 9 D. & R. 860, S. C.; Pierson v. Hutchinson, 2 Camp. 211; 6 Esp. 126, S. C. Mayor v. Johnson, 3 Camp. 324; Davis v. Dodd, 4 Taunt. 602; Champion v.

As this law, however, was found to occasion great inconvenience to the payee of a lost note,—who, in order to recover payment, was compelled to have recourse to a court of equity,<sup>1</sup>—it has been materially modified, first, by the Common Law Procedure Act of 1854,<sup>2</sup> and next, by the Bills of Exchange Act, 1882.<sup>3</sup> It is only necessary here to refer to the first named statute, which in § 87 enacts, that “In case of any action founded upon a bill of exchange or other negotiable instrument,”—which last words will include a bank note,<sup>4</sup>—“it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge, or a master against the claims of any other person upon such negotiable instrument.”<sup>5</sup> If the payee of a lost note can show that the instrument was never negotiable, as having been originally made payable to himself alone, he cannot, as it would seem, be called upon to give an indemnity under this clause, but the action will be sustainable, either on the instrument itself, or on the consideration; because, in such case, the defendant cannot be rendered liable to pay the amount a second time.<sup>6</sup>

§ 438. Secondly, the contents of writings may be proved by § 408 *secondary evidence*, when their production is either *physically impossible, or highly inconvenient*. Thus,<sup>7</sup> *inscriptions on walls and fixed tables, mural monuments, gravestones, surveyors' marks on*

Terry, 3 B. & B. 295; 7 Moore, 130, S. C.; Bevan v. Hill, 2 Camp. 381; Woodford v. Whiteley, M. & M. 517. See Alexander v. Strong, 9 M. & W. 733; Lubbock v. Tribe, 3 M. & W. 607; Blackie v. Pidding, 6 Com. B. 196; Charnley v. Grundy, 14 Com. B. 608.

<sup>1</sup> Warmley v. Child, 1 Ves. Sen. 341; Toulmin v. Price, 5 Ves. 238; Ex parte Greenway, 6 Ves. 812; Macartney v. Graham, 2 Sim. 285; Davies v. Dodd, 1 Wils. Ex. 110; Mossop v. Eadon, 16 Ves. 430.

<sup>2</sup> 17 & 18 V., c. 125. The Irish Act, 19 & 20 V., c. 102, contains a similar provision in § 90.

<sup>3</sup> 45 & 46 V., c. 61, §§ 69 & 70.

<sup>4</sup> M'Donnell v. Murray, 9 Ir. Law R., N. S. 495.

<sup>5</sup> See Aranquren v. Scholfield, 1 H. & N. 494; King v. Zimmerman, 40 L. J., C. P. 278.

<sup>6</sup> Wain v. Bailey, 10 A. & E. 616; recognised in Ramuz v. Crowe, 1 Ex. R. 173; Clay v. Crowe, 8 Ex. R. 298. As to what is the effect of the bill being destroyed, see § 322 of the 1st Ed. of this work, and Wright v. Ld. Maidstone, 1 Kay & J. 701, per Wood, V.-C. See, too, Conflans Quarry Co. v. Parker, 3 Law Rep., C. P. 1; 37 L. J., C. P. 51, S. C.; where circular notes having been lost, the party losing them was held not entitled to sue the bankers for money had and received.

<sup>7</sup> Gr. Ev. § 94, in part.

boundary trees, notices warning trespassers affixed on boards, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in court.<sup>1</sup> A remarkable illustration of this rule was furnished in the case of a man, who was convicted of writing a libel on the wall of the Liverpool gaol, on mere proof of his handwriting.<sup>2</sup> But, in order to let in secondary evidence, it must clearly appear that the document or writing is affixed to the freehold, and cannot easily be removed; and therefore, where a notice was merely suspended to the wall of an office by a nail, it was considered necessary to produce it at the trial.<sup>3</sup> On one occasion, the Committee for Privileges in the House of Lords received in evidence, as proof in a pedigree,<sup>4</sup> a copy of a plate of the arms of the Knights of the Garter, which had been put up in the Chapel Royal at Windsor in the reign of Henry V., and which, being fastened to the building only by screws, was physically removable; but this case seems to rest, at least partly, on the ground that the plate in question could not have been removed without a special warrant from the Queen.<sup>5</sup> If a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted, because in that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original.<sup>6</sup>

§ 439.<sup>7</sup> On a similar ground, the existence and contents of any record of a judicial court, and of entries in any other *public books or registers*, may be proved by an examined copy, and in some cases by an office copy, by a certified copy, or even by a mere

<sup>1</sup> *Mortimer v. McCallan*, 6 M. & W. 68, per Ld. Abinger, and 72, per Alderson, B.; *R. v. Fursey*, 6 C. & P. 84, 85; *Doe v. Cole*, id. 360, per Patteson, J.; *Bartholomew v. Stephens*, 8 C. & P. 728, per id.; *Bruce v. Nicolopulo*, 11 Ex. R. 129.

<sup>2</sup> Mentioned by Ld. Abinger, 6 M. & W. 68.

<sup>3</sup> *Jones v. Tarleton*, 9 M. & W. 675; 1 Dowl. N. S. 625, S. C.

<sup>4</sup> *Semble*, the above evidence would not have been admissible, had not the question at issue related to a *pedigree*, *Berkeley Peer.*, 8 H. of L. Cas. 21, 37.

<sup>5</sup> *Shrewsbury Peer*, 7 H. of L. Cas., 1, 10.

<sup>6</sup> *Alivon v. Furnival*, 1 C. M. & R. 277, 291, 292; *Boyle v. Wiseman*, 10 Ex. R. 647; *Quilter v. Jorss*, 14 Com. B., N. S. 747, S. C. See 14 & 15 V., c. 99, § 7; and *Crispin v. Doglioni*, 32 L. J., Fr. & Mat. 109.

<sup>7</sup> Gr. Ev. § 91, in part.

certificate.<sup>1</sup> This rule extends to all records, and entries of a public nature in books required by law to be kept; and is adopted,—partly, because of the serious risk of loss which the removal of such documents would occasion,—partly, because of the inconvenience which the public might experience from the removal, especially if the documents were wanted in two or more places about the same time,—and partly, because of the public character of the facts recorded, and the consequent facility of detection of any fraud or error in the copy.<sup>2</sup>

§ 440. Thirdly, when the document is in the *possession of the adversary, who withholds it at the trial*, secondary evidence of its contents will be admitted, *provided that a notice to produce the original* has been duly served, where such notice is requisite.<sup>3</sup> In the application of this rule, no distinction is recognised between civil and criminal cases; but in either mode of proceeding, in order to render the notice available, it must be first shown that the instrument is in the hands, or under the control, of the party required to produce it.<sup>4</sup> Of this fact very slight evidence will raise a sufficient presumption, where the document exclusively belongs to him, or regularly ought to be in his custody according to the course of business; and therefore, where a bankruptcy certificate was proved to have been obtained for the defendant, the court presumed that it had come into his possession.<sup>5</sup> So, if papers were last seen in the hands of the defendant, it lies upon him to trace them out of his possession,<sup>6</sup> and for this purpose he may interpose with evidence while the plaintiff's case is proceeding; and, as such evidence is submitted to the judge alone, its admission does not give the plaintiff's counsel a right to reply to the jury.<sup>7</sup> It would seem that,

<sup>1</sup> This subject will be discussed post, § 1534, et seq.

<sup>2</sup> B. N. P. 226.

<sup>3</sup> R. v. Watson, 2 T. R. 201, per Buller, J.; Att.-Gen. v. Le Marchant, id. n.; Cates v. Winter, 3 T. R. 306. As to the presumption respecting the stamp, see ante, § 148.

<sup>4</sup> Sharpe v. Lamb, 11 A. & E. 805; 3 P. & D. 454, S. C.

<sup>5</sup> Henry v. Leigh, 3 Camp. 502, per Ld. Ellenborough. See, also, Robb v. Starkey, 2 C. & Kir. 143.

<sup>6</sup> R. v. Thistlewood, 33 How. St. Tr. 757, 758; R. v. Inga, id. 989.

<sup>7</sup> Harvey v. Mitchell, 2 M. & Rob. 366, per Parke, B.; Smith v. Slesap, 1 C. & Kir. 48, per Alderson, B.

where a party has notice to produce a particular instrument traced to his possession, he cannot object to parol evidence of its contents, on the ground that, previous to the notice, he had ceased to have any control over it, unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it;<sup>1</sup> neither can he escape the effect of the notice, by afterwards voluntarily parting with the instrument, which it directs him to produce.<sup>2</sup>

§ 441. If the instrument be in the possession of a person in *privity* with the party, such as his banker,<sup>3</sup> agent, servant, deputy, or the like, such person need not be served with a subpoena duces tecum, or even be called as a witness, but a notice given to the party himself will suffice.<sup>4</sup> Thus, a notice to a shipowner to produce papers, though the captain has possession of them for his own protection,<sup>5</sup>—or a notice to a sheriff to produce a warrant, which is shown to have been returned to the under-sheriff during the time that the sheriff remained in office,<sup>6</sup>—will justify the admission of secondary evidence. Where a document deposited in a court of equity by a party to a suit, and scheduled in his answer, had been ordered to be delivered to him, it was held to be sufficiently within his control to let in secondary evidence after notice to produce, though it appeared that, at the time of the trial, the document was still in the hands of an officer of the court.<sup>7</sup> But though, in order to render the notice available, the party need not have actual possession of the instrument, he must have such a right to it as would entitle him, not merely to inspect, but to retain

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<sup>1</sup> *Sinclair v. Stevenson*, 1 C. & P. 585, 586, per Best, C. J. In *Knight v. Martin*, Gow, R. 103, where secondary evidence was held inadmissible, the party, who was served with notice to produce a lease, told his opponent that he had assigned it.

<sup>2</sup> Per Dallas, C. J., in *Knight v. Martin*, Gow, R. 104.

<sup>3</sup> *Partridge v. Coates*, Ry. & M. 156, per Abbott, C. J.; *Burton v. Payne*, 2 C. & P. 520, per Bayley, J.

<sup>4</sup> *Sinclair v. Stevenson*, 1 C. & P. 584, per Best, C. J.

<sup>5</sup> *Baldney v. Ritchie*, 1 Stark. R. 338, per Ld. Ellenborough.

<sup>6</sup> *Taplin v. Atty*, 3 Bing. 164; *Suter v. Burrell*, 2 H. & N. 867; 27 L. J., Ex. 193, S. C.

<sup>7</sup> *Rush v. Peacock*, 2 M. & Rob. 162, per Ld. Denman.

it; and, therefore, where it was held by a stakeholder between the defendant and a stranger to the cause,<sup>1</sup> or where it was delivered to a third person, under whom the defendant justified in an action of trespass, and by whose directions he acted,<sup>2</sup> parol evidence of its contents was rejected, notwithstanding that a notice to produce had been duly served on the defendant.

§ 442. The notice,—which must, as it would seem, be given not only in *writing*,<sup>3</sup> but, so far as civil proceedings are concerned, in a special form,<sup>4</sup>—may be directed to the party or to his solicitor, and may be served on either;<sup>5</sup> indeed, it will be sufficient to leave the notice with a servant of the party at his dwelling-house,<sup>6</sup> or with a clerk at the solicitor's office; and where the solicitor has been changed, a notice served on the first solicitor before the change will suffice; for otherwise the effect of the notice might be easily evaded by changing the legal adviser on the eve of the trial.<sup>7</sup> A notice duly served on the party will not be rendered invalid by a subsequent bad service on the solicitor.<sup>8</sup> § 412

§ 443. It may be difficult to lay down any general rule as to § 413

<sup>1</sup> Parry v. May, 1 M. & Rob. 279, per Littledale, J.

<sup>2</sup> Evans v. Sweet, Ry. & M. 83, per Best, C. J.

<sup>3</sup> See Rules of Sup. Ct., 1883, Order LXVI., R. 1.

<sup>4</sup> Order XXXII., R. 8. The form is as follows:—

No. 14. App. B.

[Heading as in Form 1.]

“Take notice, that you are hereby required to produce and show to the court on the trial of this all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this , and particularly

Dated the day of , 18 .

To the above-named .

h solicitor or agent.

(Signed) , of , agent for , solicitor for the above-named .”

<sup>5</sup> Hughes v. Budd, 8 Dowl. 315; R. v. Barker, 1 Fost. & Fin. 326; R. v. Boucher id. 486; Houseman v. Roberts, 5 C. & P. 394; Cates v. Winter, 3 T. R. 306. This last case was a *qui tam* action. See R. v. Downham, 1 Fost. & Fin. 386.

<sup>6</sup> Evans v. Sweet, Ry. & M. 84, per Best, C. J.

<sup>7</sup> Doe v. Martin, 1 M. & Rob. 242, per Tindal, C. J.

<sup>8</sup> Hughes v. Budd, 8 Dowl. 315, per Patteson, J.

*what the notice ought to contain*, since much must depend on the particular circumstances of each case; but thus much is clear, first, that no misstatement or inaccuracy in the notice will be deemed material, if it be not really calculated to mislead the opponent;<sup>1</sup> and next, that it is not necessary, by condescending minutely to dates, contents, parties, &c., to specify the precise documents intended. Indeed, it may be dangerous to do so, since if any material errors were to creep into the particulars, the party sought to be affected by the notice might urge, with possible success, that he had been misled thereby. If enough is stated on the notice to induce the party to believe that a particular instrument will be called for, this will be sufficient.<sup>2</sup> Thus a notice to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action,"<sup>3</sup> or "all letters written to or received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf; and also all books, papers, &c., relating to the subject matter of this cause,"<sup>4</sup> has been held sufficient to let in parol evidence of a particular letter not otherwise specified. In these cases the names of the parties by and to whom the letters were addressed appeared on the notice, and perhaps this circumstance sufficiently distinguishes them from an older decision,<sup>5</sup> where a notice to produce "all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered,"<sup>6</sup> was held too vague to admit secondary proof of a notice of dishonour sent by the plaintiff to the defendant. The authority, however, of this last case has been considerably shaken, if not entirely overruled, by a subsequent decision of the court of Queen's Bench, where, in an action for work and labour, a notice to pro-

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<sup>1</sup> *Justice v. Elstob*, 1 Fost. & Fin. 258; *Graham v. Oldis*, id. 262.

<sup>2</sup> See *Rogers v. Custance*, 2 M. & Rob. 181.

<sup>3</sup> *Jacob v. Lee*, 2 M. & Rob. 33, per Patteson, J.; *Conybeare v. Farries*, 5 Law Rep., Ex. 16.

<sup>4</sup> *Morris v. Hauser*, 2 M. & Rob. 392, per Ld. Denman; C. & Marsh. 29, S. C., nom. *Morris v. Hannen*.

<sup>5</sup> This distinction was pointed out and relied upon by Patteson, J., in *Jacob v. Lee*, 2 M. & Rob. 33.

<sup>6</sup> *France v. Lucy*, Ry. & M. 341, per Best, C. J.

duce "all accounts relating to the matters in question in this cause," was held to comprehend with sufficient precision a particular account relating to a small part of the work, though it appeared that many such accounts for different parts of the work had been rendered by the plaintiff to the defendant.<sup>1</sup> The case of *Jones v. Edwards*<sup>2</sup> is not affected by this decision. That was an action against four defendants, as owners of a sloop, to recover an account for warehousing the rigging of the vessel. In order to prove that one of the defendants was a joint owner, the plaintiff called for a letter, which was stated to have been written nine years before by this defendant to the son of another defendant, and relied upon a "notice to produce letters and copies of letters, and all books relating to the cause." The Court decided that the notice was too uncertain, and no sensible man could entertain a different opinion.

§ 444. In one case, where the notice misdescribed the title of the cause, it was held to be invalid;<sup>3</sup> but as the strict application of this rule, in cases where it is evident that the party served has not been misled, might be productive of serious injustice, it is hoped that, at the present day, it would not be allowed to prevail, unless the misdescription were of a flagrant nature. Indeed, the Court of Exchequer has thrown out an intimation to this effect; for where a notice was objected to on the ground that it was entitled (by mistake) in a wrong court, Mr. Baron Alderson discountenanced the objection, saying, "One does not know where we are to stop. Would the notice be bad if one of the names was spelt wrong? . . . At the time of the decision in *Harvey v. Morgan*, the courts were much more strict than now as to matters of this nature."<sup>4</sup>

§ 445. As to the *time* and *place* of the *service*, no precise rule can be laid down, except that it must be such as to enable the party, under the known circumstances of the case, to comply with the call.<sup>5</sup> If the person to be served, whether client or solicitor,

<sup>1</sup> *Rogers v. Custance*, 2 M. & Rob. 179.

<sup>2</sup> M'Cl. & Y. 139.

<sup>3</sup> *Harvey v. Morgan*, 2 Stark. R. 17. The notice in that case was entitled "A. & B., assignees of C. & D., v. E.," instead of "A. & B., assignees of C. v. E."

<sup>4</sup> *Lawrence v. Clark*, 14 M. & W. 251.

<sup>5</sup> *R. v. Hankins*, 2 C. & Kir. 823; *R. v. Kitson*, Pearce & D. 187.



dwell in another town than that in which the trial is had, he must generally be served before the commission day,<sup>1</sup> and if the service be postponed until he has left home to attend the court, it will be insufficient.<sup>2</sup> In town causes, however, and in country causes where the solicitor lives in the assize town, a shorter notice will be required, and provided the documents be such as may reasonably be presumed to be in the solicitor's possession, a service on him, or at his office, before six o'clock<sup>3</sup> in the afternoon of the day preceding the trial, will in general be sufficient;<sup>4</sup> though, if they would probably be in the client's custody,—as, for instance, if they were a tradesman's books,<sup>5</sup> or if they were letters or papers not obviously connected with the cause,—such a service would be too late, since the solicitor should have sufficient time to communicate with his client for the purpose of procuring the documents required.<sup>6</sup> If a party be served with notice sufficiently early to enable him to produce the document, it makes no difference that at the time of the service the cause is part heard.<sup>7</sup>

§ 446. If the party served can prove that his papers are in a *foreign country*, or at such a distance from the place of trial as to

<sup>1</sup> *Trist v. Johnson*, 1 M. & Rob. 259, per Park, J.; *R. v. Ellicombe*, id. 260, per Littledale J.; *Lessee of Leader v. Duggan*, Ir. Cir. R. 124; *Humphrey v. St. Leger*, id. 714; *M'Master & Boyle's case*, id. 768. See *Howard v. Williams*, 9 M. & W. 725.

<sup>2</sup> *George v. Thompson*, 4 Dowl. 656; *Hargest v. Fothergill*, 5 C. & P. 303, per Taunton, J.

<sup>3</sup> See post, § 1586A, citing Order LXIV., R. 11, of the Rules of the Sup. Ct., 1883.

<sup>4</sup> *Atkins v. Meredith*, 4 Dowl. 658; *Leaf v. Butt, C. & Marsh.* 451, per Alderson, B.; *Meyrick v. Woods*, id. 452, per id.; *Firkin v. Edwards*, 9 C. & P. 478, per Williams, J.; *Gibbons v. Powell*, id. 634, per Gurney, B.; *R. v. Hamp*, 6 Cox, 167, per Ld. Campbell; *Holt v. Miers*, 9 C. & P. 195; *Lawrence v. Clark*, 14 M. & W. 250. If the trial is to take place on the Monday, a service on the Sunday, or even on Saturday after 2 p. m. (see Rule cited in last note), will not do; and perhaps a service on a Sunday would in any event be considered bad. See *Hughes v. Budd*, 8 Dowl. 317, per Patteson, J.; and 29 C. 2, c. 7, § 6.

<sup>5</sup> *Atkins v. Meredith*, 4 Dowl. 658.

<sup>6</sup> *Byrne v. Harvey*, 2 M. & Rob. 89, per Ld. Denman; *Vice v. Lady Anson*, M. & M. 97, per Ld. Tenterden; *Aflalo v. Fourdrinier*, id. 335, n., per Tindal, C. J.

<sup>7</sup> *Sturm v. Jeffree*, 2 C. & Kir. 442, per Pollock, C. B.

render it impossible for him to produce them under an ordinary notice, such a notice will be inoperative; but the courts are very properly inclined to favour the sufficiency of the notice, whenever the circumstances of the case will warrant them in so doing. Thus, where a party had gone abroad, leaving the cause in the hands of his solicitor, it was presumed that he had left with him all papers material to the cause, and, consequently, a notice served on the solicitor the evening next but one before the trial, was held to be sufficient.<sup>1</sup> So, a four days' notice, given to the defendant to produce letters written by him to his partner in New South Wales, was considered good, where long litigation on the subject of them made it presumable that they had been remitted to this country.<sup>2</sup> It has even been held, that a similar notice to a foreign defendant was sufficient, though the letters required had been addressed to him eighteen years before at his residence abroad. In that case, the action had commenced seven months before the trial; and though it was objected that the defendant had had no time to procure the original papers to be transmitted from his own country, where it was to be presumed they had been left, C. J. Abbott admitted secondary evidence of their contents, observing that it would lead to great inconvenience and delay, if trials were allowed to be postponed upon such an objection.<sup>3</sup>

§ 447. The party who seeks the production of papers must not § 417 put his adversary to needless trouble and expense. Therefore, where a defendant's solicitor, having been served in Essex with notice to produce certain deeds, fetched them from London, and on the commission day was served with a fresh notice to produce another deed, upon which he stated that the document was in town, where he had already been once, but that it should be forthcoming at the trial if the plaintiff would pay the expenses of a messenger, which offer was declined, the court held that the defendant was justified in not complying with the notice,

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<sup>1</sup> *Bryan v. Wagstaff*, Ry. & M. 327, per Abbott, C. J.; 2 C. & P. 125, S. C.

<sup>2</sup> *Sturge, v. Buchanan*, 10 A. & E. 598.

<sup>3</sup> *Drabble v. Donner*, Ry. & M. 47. But see *Ehrenspergen v. Anderson*, 3 Ex. R. 148.

and that secondary evidence was inadmissible.<sup>1</sup> If a party, on being served with a notice to produce a document, states that it is not in existence, parol proof of its contents will be received, and no objection can be taken to the lateness of the service.<sup>2</sup> It may here be added, that a notice to produce certain documents "upon the trial of the cause," applies not merely to the trial which it immediately precedes, but to every subsequent trial of the same cause which may take place.<sup>3</sup>

§ 448. The mode of proving that a notice to produce has been § 418  
duly served is now regulated by the Rules of the Supreme Court, 1883, Order XXXII R. 8,<sup>4</sup> which provides, that "An affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served."

§ 449. In *seven cases* notice to produce is *not necessary*. The § 419  
*first* is, where the instrument in the possession of the adversary, and that tendered in proof, are either *duplicate originals*,<sup>5</sup> or are *counterparts*, and the part offered in evidence has been executed by the adversary, or by some person through whom he claims. Here no notice is necessary, because, as before stated, the instrument produced is considered, not as secondary, but as primary evidence.<sup>6</sup>

§ 450. *Secondly*, a notice to produce is not required, where the § 420  
instrument to be proved is itself a *notice*. This exception appears to have been originally adopted in regard to notices to produce, for the obvious reason, that, if a notice to produce such papers were

<sup>1</sup> Doe v. Spitty, 3 B. & Ad. 182. In this case, the second notice, having been served on the commission day, would perhaps have been held too late, independent of the special circumstances.

<sup>2</sup> Foster v. Pointer, 9 C. & P. 720, per Gurney, B.

<sup>3</sup> Hope v. Beadon, L. M. & P. 593; 17 Q. B. 509, S. C.

<sup>4</sup> The Irish Act, 16 & 17 V., c. 113, contains, in § 120, a somewhat similar provision.

<sup>5</sup> Colling v. Treweek, 6 B. & C. 398, per Bayley, J.; Philipson v. Chase, 2 Camp. 111, per Ld. Ellenborough.

<sup>6</sup> Ante, § 426.

necessary, the series of notices would become infinita.<sup>1</sup> The judges, however, have subsequently extended the exception to many other notices; partly, perhaps, from a misapprehension of the ground on which the doctrine rests;<sup>2</sup> partly, from the experienced inconvenience attendant on a strict observance of the rule requiring notice;<sup>3</sup> partly, because the secondary evidence that is usually offered of a notice is a copy of the paper sent, which partakes in a great measure of the character of a duplicate original;<sup>4</sup> and, chiefly, because it constantly happens that the opposite party is well aware, from the nature of the action, that he will be charged with the possession of the original document.<sup>5</sup> On one or other of these grounds, it has been held, that, in order to let in proof by a copy, if not any species of secondary evidence, no notice is required to produce a notice to quit;<sup>6</sup> a notice of dishonour,<sup>7</sup> provided the action be brought upon the bill, but not otherwise;<sup>8</sup> notices of action, or written demands, which are necessary to entitle the plaintiff to recover;<sup>9</sup> and bills of costs of solicitors, and parliamentary agents, delivered pursuant to statute.<sup>10</sup>

<sup>1</sup> 3 St. Ev. 730; *Philipson v. Chase*, 2 Camp. 111. But see ante, § 448.

<sup>2</sup> In *Philipson v. Chase*, 2 Camp. 111, *Ld. Ellenborough* observes, "I approve of the practice as to notices to quit; and I remember when the point was first ruled by *Wilson, J.*, who said, that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required in infinitum." The fallacy of this reasoning is ably exposed in 3 St. Ev. 730.

<sup>3</sup> 2 Ph. Ev. 226, n. 5.

<sup>4</sup> *Kine v. Beaumont*, 3 B. & B. 291.

<sup>5</sup> *Colling v. Treweek*, 6 B. & C. 399, 400, per *Bayley, J.*; *Robinson v. Brown*, 3 Com. B. 754, per *Maule, J.* See post, § 452.

<sup>6</sup> *Doe v. Somerton*, 7 Q. B. 58; *Jory v. Orchard*, 2 B. & P. 41, per *Ld. Eldon*; *Colling v. Treweek*, 6 B. & C. 398, per *Bayley, J.* See *R. v. Mortlock*, 7 Q. B. 459.

<sup>7</sup> *Swain v. Lewis*, 2 C. M. & R. 261; 5 Tyr. 998, S. C.; *Kine v. Beaumont*, 3 B. & B. 288; 7 Moore, 112, S. C.; *Ackland v. Pearce*, 2 Camp. 601, per *Ld. Blanc, J.*; *Roberts v. Bradshaw*, 1 Stark. R. 28; *Colling v. Treweek*, 6 B. & C. 398, per *Bayley, J.* These cases—the first two of which were decided after conferring with the judges of the other courts,—put the question beyond all dispute, and overrule the earlier decisions of *Langdon v. Hulls*, 5 Esp. 156, and *Shaw v. Markham*, Pea. R. 165.

<sup>8</sup> *Lanauze v. Palmer*, M. & M. 31, per *Abbott, C. J.*

<sup>9</sup> *Jory v. Orchard*, 2 B. & P. 39.

<sup>10</sup> *Colling v. Treweek*, 6 B. & C. 394; 9 D. & R. 456, S. C. This case was decided on § 23 of the repealed Act, 2 G. 2, c. 23, but it is equally applicable to § 37 of 6 & 7 V., c. 73.

§ 451. On one occasion, where an action was brought against a surety, on a bond conditioned to pay to the plaintiff, within six months after notice, the sum that should become due from the principal, a notice to produce this notice was held necessary by Lord Ellenborough, on the ground that it was not a mere notice, but in the nature of a statement of account between the plaintiff and the principal.<sup>1</sup> Whether this case would now be considered a binding authority, may be well questioned, since, in principle, it is difficult to distinguish it from several of the cases cited above, in which the notice to produce has been deemed unnecessary. But, be this as it may, the judges have determined,—in a case where two parties had become sureties, by a joint and several bond, for the payment, within one month after notice should have been given to them, of such sum as should be due from their principal,—that the service of notice upon one of the parties could not be proved in an action brought against the other, by producing the duplicate of the notice, but the first party should have been subpoenaed to produce the original, or to account for its non-production.<sup>2</sup> Indeed, the exception would seem to be always inapplicable to cases in which the notice has been served on a third person.<sup>3</sup>

§ 452. *Thirdly*, if, from the nature of the action, or indictment, or from the form of the pleadings, the *defendant must know* that he will be charged with the possession of an instrument, and be *called upon to produce* it, no notice to produce need be served upon him.<sup>4</sup> Thus, in an action of trover for converting a bond, a bill of exchange, or other writing,<sup>5</sup> or in a prosecution for stealing any document,<sup>6</sup> the counsel for the plaintiff or the Crown may at once produce secondary evidence of its contents, even though the defen-

<sup>1</sup> Grove v. Ware, 2 Stark. R. 174.

<sup>2</sup> Robinson v. Brown, 3 Com. B. 754.

<sup>3</sup> Id.

<sup>4</sup> Colling v. Treweek, 6 B. & C. 398, 399, per Bayley, J. See ante, §§ 407, 408.

<sup>5</sup> Scott v. Jones, 4 Taunt. 865; How v. Hall, 14 East, 275; Bucher v. Jarratt, 3 B. & P. 143. These cases overrule Cowan v. Abrahams, 1 Esp. 50.

<sup>6</sup> R. v. Aickles, 1 Lea. 297, n. a.; R. v. Brennan, 3 Craw. & D., C. C. 109, per Perrin, J.

dant should offer to produce the document itself;<sup>1</sup> and this exception has been recognised in an action on contract against a carrier for the non-delivery of written instruments,<sup>2</sup> as also in indictments for conducting a traitorous correspondence.<sup>3</sup> It has, however, been held inapplicable on a charge of forging a deed;<sup>4</sup> and no doubt can be entertained that an indictment for arson, with intent to defraud an insurance office, does not convey such a notice that the policy will be required, as to dispense with a formal notice to produce.<sup>5</sup> So, if the maker of a note or cheque, or the acceptor of a bill, does not, as defendant in an action, deny by his plea the making or acceptance, the plaintiff, who is not bound to produce the instrument as part of his case,<sup>6</sup> since it is admitted on the record, may object to the defendant's giving secondary evidence of its contents, for the purpose even of identification, unless a notice to produce has been duly served,<sup>7</sup> or unless the instrument is shown to be in court.<sup>8</sup>

§ 453. *Fourthly*, in odium spoliatoris, a notice need not be given to the adverse party to produce a paper, of which he has fraudulently or forcibly obtained possession, as where, after action brought, he has received it from a witness, in fraud of a subpoena duces tecum.<sup>9</sup>

<sup>1</sup> *Whitehead v. Scott*, 1 M. & Rob. 2, per *Ld. Tenterden*.

<sup>2</sup> *Jolley v. Taylor*, 1 Camp. 143, per *Sir J. Mansfield*, C. J.

<sup>3</sup> *R. v. De la Motte*, 1 East, P. C. 124; *Layer's Case*, 16 How. St. Tr. 170, 171.

<sup>4</sup> *R. v. Haworth*, 4 C. & P. 254, per *Parke, J.* See *Spragge's case*, cited by *Ld. Ellenborough*, 14 East, 276; also, *R. v. Elworthy*, 1 Law Rep., C. C. 103; 37 L. J., M. C. 3, S. C.

<sup>5</sup> *R. v. Ellicombe*, 5 C. & P. 522, per *Littledale, J.*; 1 M. & Rob. 260, S. C.; *R. v. Kitson*, 22 L. J., M. C. 118; *Pearce & D.* 187, S. C. See *R. v. Humphries*, cited 2 Russ. C. & M. 745; *R. v. Mortlock*, 7 Q. B. 459.

<sup>6</sup> The plaintiff, however, cannot recover interest on the bill from the date of its maturity without producing it. *Hutton v. Ward*, 15 Q. B. 26; *Chaplin v. Levy*, 9 Ex. R. 534, per *Parke, B.*

<sup>7</sup> *Goodered v. Armour*, 3 Q. B. 956; explaining *Read v. Gamble*, 5 N. & M. 433; 10 A. & E. 597, n. a, S. C.; *Lawrence v. Clark*, 14 M. & W. 250, 253. See, also, *Chaplin v. Levy*, 9 Ex. R. 534, per *Parke, B.*

<sup>8</sup> *Dwyer v. Collins*, 7 Ex. R. 639.

<sup>9</sup> *Leeds v. Cook*, 4 Esp. 256, per *Ld. Ellenborough*; *Doe v. Ries*, 7 Bing. 724.

§ 454. *Fifthly*, the Legislature has interfered on behalf of *merchant seamen*, whose proverbial inexperience and recklessness have rendered them fit objects for special statutory protection, and has enacted, that every seaman may bring forward evidence to prove the contents of his agreement with the master of the ship, or otherwise to support his case, without producing or giving notice to produce the agreement itself or any copy of it.<sup>1</sup> § 424

§ 455. *Sixthly*, notice will not be required, either where the adverse party or his solicitor has admitted the loss of the document, for in such case the notice would be nugatory,<sup>2</sup> or, it seems, where the party in possession of the writing might himself give secondary evidence of its contents without producing it, as, for instance, if it be an inscription or notice attached to the freehold.<sup>3</sup> A party, however, cannot under this exception call witnesses to prove the destruction of a document that has been traced into the hands of his opponent, and then show its contents by secondary proof without serving a notice to produce, because, notwithstanding evidence to the contrary, the document may still be in existence, and, at any rate, the opponent may dispute the fact of its destruction.<sup>4</sup> § 425

§ 456. *Lastly*, a notice to produce is rendered unnecessary by *proof* that the adverse party, or his solicitor, has the original instrument in court; for the object of the notice is not,—as was formerly thought,<sup>5</sup>—to give the opposite party an opportunity of providing the proper testimony to support or impeach the document; but it is merely to enable him to produce it, if he likes, at the trial, and thus to secure the best evidence of its contents.<sup>6</sup> The question is yet undecided, as to whether a solicitor would § 246

<sup>1</sup> 17 & 18 V., c. 104, § 165. See *Bowman v. Manzelman*, 2 Camp. 315.

<sup>2</sup> *R. v. Haworth*, 4 C. & P. 254, per Parke, J.; *Foster v. Pointer*, 9 C. & P. 718, per Gurney, B.; *How v. Hall*, 14 East, 276, per Ld. Ellenborough; *Doe v. Spitty*, 3 B. & Ad. 182.

<sup>3</sup> *Bartholomew v. Stephens*, 8 C. & P. 728, per Patteson, J.

<sup>4</sup> *Doe v. Morris*, 3 A. & E. 46; 4 N. & M. 598, S. C.

<sup>5</sup> *Bate v. Kinsey*, 1 C. M. & R. 38; *Cook v. Hearn*, 1 M. & Rob. 201, per Patteson, J.; *Doe v. Grey*, 1 Stark. R. 284, per Ld. Ellenborough; *Exall v. Partridge*, *id.*, cited as ruled per Ld. Kenyon.

<sup>6</sup> *Dwyer v. Collins*, 7 Ex. R. 639.

be ordered to search among his papers, if, on being called by his client's opponent to state whether he had a particular document in court, he were to assert that he did not know whether he had brought it with him or not, and that he did not intend to ascertain that fact, unless he were compelled to do so by the judge.

§ 456A. In order to check the service of vexatious notices to produce, a rule has been inserted in the Orders of 1883, which provides that, "if a notice to produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice."<sup>1</sup>

§ 457. Secondary evidence is, in the fourth place, admissible, § 437 when a document is in the hands of a stranger, who is *not compelled by law* to produce it, and who *refuses* to do so, either when summoned as a witness with a subpoena duces tecum,<sup>2</sup> or when sworn as a witness without a subpoena, if he admits that he has the document in court.<sup>3</sup> In applying this rule it must be carefully borne in mind, that the mere disobedience of a person served with a subpoena duces tecum will not render admissible secondary evidence of the contents of the document which he is called upon to produce;<sup>4</sup> but the witness must also be *justified* in refusing the production, for otherwise the party will have no remedy, except as against *him*.<sup>5</sup> The reason why the rule is recognised at all is the same as that which admits parol proof, when the adversary, after notice, refuses to produce a deed in his possession,—namely, that the party offering secondary evidence has done all in his power to obtain the original document.<sup>6</sup> If therefore a solicitor refuses to produce a deed as claiming a lien upon it, secondary evidence of its contents cannot be received, provided the party tendering such evidence be the person liable to pay the solicitor's charges.<sup>7</sup> So,

<sup>1</sup> Rules of Sup. Ct. Ord. XXXII., R. 9.

<sup>2</sup> *Marston v. Downes*, 1 A. & E. 31; 4 N. & M. 861; 6 C. & P. 381, S. C.; *Doe v. Ross*, 7 M. & W. 102; *Mills v. Oddy*, 6 C. & P. 728, per Parke, B. The case of *Doe v. Owen*, 8 C. & P. 110, can no longer be supported.

<sup>3</sup> *Doe v. Clifford*, 2 C. & Kir. 448, per Alderson, B.; *Newton v. Chaplin*, 10 Com. B. 356.

<sup>4</sup> *Jesus Coll. v. Gibbs*, 1 Y. & C., Ex. R. 156.

<sup>5</sup> *R. v. Llanfaethly*, 2 E. & B. 940.

<sup>6</sup> *Doe v. Ross*, 7 M. & W. 122.

<sup>7</sup> *Att.-Gen. v. Ashe*, 10 Ir. Eq. R., N. S. 300.



also, if a solicitor, who is not acting under special instructions from his client, declines to produce an instrument on the ground of privilege, it may be very questionable whether the client must not be subpoenaed, in order to ascertain whether he also relies on his right to withhold the deed;<sup>1</sup> and this course will assuredly be prudent, inasmuch as the privilege is, in strictness, not that of the solicitor, but that of the client. If, indeed, the solicitor can undertake to swear that his client has instructed him not to produce the instrument, it will not be necessary to subpoena the client; for in such a case the court would very properly assume that the client, if called, would continue to be of the same mind.<sup>2</sup>

§ 458. Upon principles of reason and equity, judges will refuse to compel either a witness or a party to a cause<sup>3</sup> to produce either his title-deeds,<sup>4</sup> or any document the production of which may tend to criminate him,<sup>5</sup> or any document which he holds as mortgagee<sup>6</sup> or pledgee.<sup>7</sup> But a witness will not be allowed to resist a subpoena duces tecum on the ground of any lien<sup>8</sup> he may have on the document called for as evidence,<sup>9</sup> unless the party requiring the produc-

<sup>1</sup> Doe v. Ross, 7 M. & W. 122; Newton v. Chaplin, 10 Com. B. 356; In re Cameron's Coalbrook, &c., Rail. Co., 25 Beav. 1.

<sup>2</sup> Phelps v. Prew, 3 E. & B. 430

<sup>3</sup> The rule, so far as it relates to parties, appears to be this; a plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information, and belief, contain anything impeaching his case, or supporting or material to the case of the defendant. *Mjnet v. Morgan*, 8 Law Rep., Ch. Ap. 361; 42 L. J., Ch. 627, S. C.

<sup>4</sup> *Pickering v. Noyes*, 1 B. & C. 263; 2 D. & R. 386, S. C.; *Harris v. Hill*, 2 Stark. R. 140, per Abbott, C. J.; D. & R., N. P. R. 17, S. C.; *R. v. Upper Boddington*, 8 D. & R. 726; *Doe v. Clifford*, 2 C. & Kir. 448; *Egremont Burial Board v. Egremont Iron Ore Co.*, L. R., 14 Ch. D. 158, per Malins, V.-C.; 49 L. J., Ch. 623, S. C.

<sup>5</sup> See *Whitaker v. Izod*, 2 Taunt. 115.

<sup>6</sup> *Doe v. Ross*, 7 M. & W. 102, 122; 8 Dowl. 389, S. C., explained by *Ld. Just. Turner* in *Hope v. Liddell*, 24 L. J., Ch. 694; 7 De Gex, M. & G. 338, S. C.; *Chichester v. Marq. of Donegall*, 39 L. J., Ch. 694, per Giffard, L. J.; *Costa Rica, Republic of, v. Erlanger*, 44 L. J., Ch. 281.

<sup>7</sup> See *Ex parte Shaw*, Jac. 270.

<sup>8</sup> In the Courts of Bankruptcy, "no person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of account, belonging to the debtor, or to set up any lien thereon." Bankruptcy Rules, 1883, r. 259.

<sup>9</sup> *Hunter v. Leathley* 10 B. & C. 858; recognised by *Parke, B.*, in *Ley v. Barlow*, 1 Ex. R. 801; *Thompson v. Mosely*, 5 C. & P. 501, per *Ld. Lyndhurst*; *Brassington v. Brassington*, 1 Sim. & St. 455, per *Leach, V.-C.*; *Pratt*

tion be himself the person against whom the claim of lien is made.<sup>1</sup> If the witness be a solicitor, though he will be *permitted*, he will certainly not be *forced*,<sup>2</sup>—except in some cases for the purpose of identification,<sup>3</sup>—to produce any instrument which he holds confidentially for his client, and which his client has a right to keep back;<sup>4</sup> but, in this case, as has just been noticed, it by no means necessarily follows that, in the event of the client himself not being summoned, secondary evidence will be admissible.

§ 459. The rule exempting witnesses from producing title-deeds § 429 has been applied to a will, under which the witness claimed as devisee, though it was suggested that this will extended to personality as well as to realty, and, therefore, ought to have been deposited in the Ecclesiastical Court, where the public might have had access to it.<sup>5</sup> Still, unless it appears that the title of the person possessing the document will in some way be affected by its production, the rule will not prevail;<sup>6</sup> and, therefore, in an old action of ejectment, where the title of the lessor of the plaintiff was disputed, the solicitor of a gentleman, who had been in treaty with him for the purchase of the property, but which treaty had gone off, was allowed to produce on behalf of the defendant the abstract that had been delivered to his client, as furnishing secondary evidence

*v. Pratt*, 51 L. J., Ch. 838, per Bacon, V.-C.; *Furlong v. Howard*, 2 Sch. & Lef. 115, per Ld. Redesdale; *In re Cameron's Coalbrook, &c., Rail. Co.*, 25 Beav. 1; *Hope v. Liddell*, 7 De Gex, M. & G. 331; 24 L. J., Ch. 691; and 20 Beav. 438, S. C., overruling *Griffith v. Ricketts*, 7 Hare, 303. See, also, *Lockett v. Cary*, 3 New R. 405, per Romilly, M. R.; *Ex p. Paine & Layton*, 4 Law Rep., Ch. Ap. 215; 38 L. J., Ch. 305, S. C.; *Re Toleman*, ex p. Bramble, L. R., 13 Ch. D. 885.

<sup>1</sup> *Kemp & King*, 2 M. & Rob. 437, per Ld. Denman; recognised in *Hope v. Liddell*, 24 L. J., Ch. 693, 694; 7 De Gex, M. & G. 338, S. C. See *In re Capital Fire Ins. Assoc.*, L. R., 24 Ch. D. 408, and cases there cited. Also *In re Cameron's Coalbrook, &c., Rail. Co.*, 25 Beav. 4, per Romilly, M. R.; *Vale v. Oppert*, 10 Law Rep., Ch. Ap. 340; 44 L. J., Ch. 579, S. C. But see *Fowler v. Fowler*, 50 L. J., Ch. 686, per Kay, J., et qu. See *Re Martin*, 13 L. R. Ir. 312.

<sup>2</sup> *Hibberd v. Knight*, 2 Ex. R. 11, explaining *Marston v. Downes*, 6 C. & P. 381; 1 A. & E. 31, S. C.

<sup>3</sup> *Phelps v. Prew*, 3 E. & B. 430.

<sup>4</sup> *Harris v. Hill*, 3 Stark. R. 140; *Volant v. Soyer*, 13 Com. B. 231; *Doe v. James*, 2 M. & Rob. 47, per Ld. Denman; *Ditcher v. Kenrick*, 1 C. & P. 161. See *Doe v. Langdon*, 12 Q. B. 711.

<sup>5</sup> *Doe v. James*, 2 M. & Rob. 48, per Ld. Denman.

<sup>6</sup> *Lee v. Merest*, 39 L. J., Ec. C. 53.

of the contents of the deeds relating to property, which the lessor of the plaintiff, after notice, had refused to produce.<sup>1</sup>

§ 460. Again, the mere circumstance, that the production of the document may render the witness liable to a civil action, does not come within the protection of the rule. Thus, in an action of ejectment, in which the lessor of the plaintiff claimed as devisee in remainder, and the defendant held under an invalid lease made by the late tenant for life, a witness, who was an executor and legatee of the late tenant for life, was compelled to produce his testator's rent-book, for the purpose of enabling the lessor of the plaintiff to identify the lands in question with the lands originally devised, though the witness, as executor, was bound to indemnify the defendant from all loss he might sustain from an adverse verdict, under a covenant contained in the lease granted by the late tenant for life.<sup>2</sup> Where a witness, who was steward of a borough, and attorney for the lord, declined to produce certain old precepts, books of presentment, and a case, relative to his office, on which the opinion of counsel had been taken by a former steward, saying that he held them as attorney for the lord, and that their production would prejudice his client's interest, Lord Denman decided that he was bound to produce the precepts and presentments, they being public documents, but that the case and opinion might be withheld.<sup>3</sup>

§ 461.<sup>4</sup> Fifthly, in consequence of the strong presumption, which arises from the undisturbed exercise of a public office, that the appointment to it is valid, the law does not in general require that the *written appointments of public officers* should be produced, but it will be sufficient to show that such officers have *acted* in an official capacity.<sup>5</sup>

§ 462.<sup>6</sup> A sixth relaxation of the rule demanding primary proof

<sup>1</sup> Doe v. Langdon, 12 Q. B. 711.

<sup>2</sup> Doe v. Date, 3 Q. B. 609.

<sup>3</sup> R. v. Woodley, 1 M. & Rob. 390.

<sup>4</sup> Gr. Ev. § 92, in great part.

<sup>5</sup> See ante, § 171. See, also, Brewster v. Sewell, 3 B. & A. 302, per Holroyd, J.

<sup>6</sup> Gr. Ev. § 93, in great part.

has been admitted, where the evidence required is the result of *voluminous facts*, or of the inspection of *many books and papers*, the examination of which could not conveniently take place in court.<sup>1</sup> Thus, if bills of exchange have been drawn between particular parties in one invariable mode, this may be proved by the testimony of a witness conversant with their habits of business, and speaking generally of the fact, without producing the bills; though, if the mode of dealing has not been uniform, the case does not fall within this exception, but is governed by the rule requiring the production of the writings.<sup>2</sup> So, a witness, who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts.<sup>3</sup> And, where the question turns upon the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner.<sup>4</sup> This exception, however, will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have since been destroyed, if the object of the examination be to elicit from the witness the impression which they produced on his mind, with reference to the degree of friendship subsisting between the writer and a third party.<sup>5</sup> The distinction between this and the preceding cases is obvious; since in those, the fact in question was one, the truth of which simply depended on the honesty of the witness, whereas here, not only his honesty, but his taste and feelings were involved, and he might, from perusing the letters, conscientiously draw a very different inference as to their legitimate construction from that which would be drawn by an unbiased jury.

<sup>1</sup> Ph. Ev. 433. The rules of pleading have, for a similar reason, been made to yield to public convenience in the administration of justice, and a general allegation is frequently allowed, "when the matters to be pleaded tend to infiniteness and multiplicity whereby the rolls shall be incumbered with the length thereof." *Mints v. Bethil*, Cro. Eliz. 749, Steph. Pl. 392—396. See Rules of Sup. Ct. 1883, Ord. XIX., R. 2; Ord. LXV., R. 27, subs. 20. The courts admit the same exception in regard to parties to actions, where they are numerous, on the like grounds of convenience; Ord. XVI., R. 9.

<sup>2</sup> *Spencer v. Billing*, 3 Camp. 310, per *Ld. Ellenborough*.

<sup>3</sup> *Roberts v. Doxon*, Pea. R. 83, per *Ld. Kenyon*. But see *Johnson v. Kershaw*, 1 De Gex & Sm. 260, where this course was not allowed by *Knight Bruce*, V.-C. <sup>4</sup> *Meyer v. Sefton*, 2 Stark. R. 274, per *Holroyd, J.*

<sup>5</sup> *Topham v. M'Gregor*, 1 C. & Kir. 320, per *Rolfe, B.* See *Taylor v. Carpenter*, 2 Woodb. & M. 5, 6.

§ 463. Secondary evidence is admissible in the examination of a witness on the *voire dire*, and in *preliminary* inquiries of the same nature. But as this rule, owing to the modern improvements in the law of evidence on the subject of the competency of witnesses, has now become practically inoperative, further reference to it here is deemed unnecessary.<sup>1</sup> § 433

§ 464. Passing now to the consideration of the circumstances, under which *secondary evidence of oral testimony* will be received, and bearing in mind the broad proposition before stated,<sup>2</sup> that such proof is only admissible where the production of primary evidence is out of the party's power, it may be advanced as a general rule of law, that where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given, will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relate to the same subject, or substantially involve the same material questions.<sup>3</sup> § 434

§ 465. In discussing the effect and extent of this rule, which is now recognised by all courts of justice,<sup>4</sup> it seems almost needless to observe, that, in order to render admissible secondary evidence of the testimony of a witness, it must be proved that the witness was *duly sworn* in some judicial proceeding, to the authority of which the party, against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the *right of cross-examination*; for, if this were not the case, the preposterous con-

<sup>1</sup> See 1st Ed. of this work, § 342; and cases cited in this Ed., post, § 1393, last note.

<sup>2</sup> Ante, § 428.

<sup>3</sup> B. N. P. 239—243; *May. of Doncaster v. Day*, 3 Taunt. 262, *Strutt v. Bovingdon*, 5 Esp. 56, per Ld. Ellenborough; *R. v. Jolliffe*, 4 T. R. 290, per Ld. Kenyon; *Pyke v. Crouch*, 1 Ld. Ray. 730, 5th Res.; *Wright v. Doe d. Tatham*, 1 A. & E. 3; *Glass v. Beach*, 5 Vern. 172; *Lightner v. Wike*, 4 Serg. & R. 203.

<sup>4</sup> See *Lawrence v. Maule*, 4 Drew. 472, 479, 480, per Kindersley, V.-C. The rule has been extended to answers, *Parker v. M'Kenna*, 43 L. J., Ch. 802, and to affidavits, *Dunne v. English*, 18 Law Rep., Eq. 524. See *Meyrick v. James*, 46 L. J., Ch. 579.

sequence would follow, that secondary evidence of testimony might be received under circumstances that would exclude the testimony itself. If, therefore, it should appear that depositions were taken, either by parties not legally authorised to take them,<sup>1</sup> or without the sanction of an oath or affirmation, or in the absence of the party against whom they are offered,<sup>2</sup> when, as in most criminal investigations,<sup>3</sup> his presence was requisite, they cannot be received.<sup>4</sup>

§ 466. But although the party, against whom depositions are offered in evidence, must have had an opportunity of being present at the examination, and of cross-examining the witness,<sup>5</sup>—and therefore, if a commission be executed without any notice, or without a sufficient notice,<sup>6</sup> being given to the opposite party, to enable him, if he pleases, to put cross-interrogatories, the depositions will be rejected,<sup>7</sup>—yet, it is by no means requisite that he should exercise that power; and if notice has been given to him of the time and place of the examination, and he neither intimates any wish to cross-examine, nor applies to the court to enlarge the time for that purpose, it will be presumed that he has acted advisedly, and the depositions will be received.<sup>8</sup> So, where a defendant, after joining the plaintiff in obtaining a commission to examine witnesses upon interrogatories, gave notice that he declined to proceed with the examination; whereupon the plaintiff sent him word that he should apply for a commission *ex parte*, which he accordingly did: the court held that the examinations taken under this order were admissible in evidence, although the defendant had received no notice of the time and place of taking them.<sup>9</sup>

<sup>1</sup> 12 Vin. Ab., Ev. A. b. 31; B. N. P. 241.

<sup>2</sup> The admissibility of depositions taken before a coroner, in the absence of the accused, will be discussed hereafter. See post, § 494.

<sup>3</sup> See post, § 479.

<sup>4</sup> In *R. v. Eriswell*, 3 T. R. 721, *Ld. Kenyon* laid down that “the evidence should be given under the sanction of an oath legally administered, and in a judicial proceeding depending between the parties affected by it, or those who stand in privity of estate or interest with them.”

<sup>5</sup> *Att.-Gen. v. Davison*, M'Clel. & Y. 160.

<sup>6</sup> *Fitzgerald v. Fitzgerald*, 3 Swab. & Trist. 397.

<sup>7</sup> *Steinkeller v. Newton*, 1 Scott, N. R. 148; 8 Dowl. 579; 9 C. & P. 313, S. C.

<sup>8</sup> *Cazenove v. Vaughan*, 1 M. & Sel. 4.

<sup>9</sup> *M'Combie v. Anton*, 6 M. & Gr. 27.

§ 467.<sup>1</sup> The admissibility of this evidence seems to turn, rather § 436  
on the right to cross-examine, than upon the precise identity, either  
of the parties or of the points in issue, in the two proceedings.  
Therefore, where a witness testified in a suit, wherein A. and several  
others were plaintiffs and B. defendant, his testimony was, after his  
death, held admissible in a subsequent action relating to the same  
matter, brought by B. against A. alone.<sup>2</sup> And although the two  
trials be not between the same parties, yet, if the second trial is  
between those who represent the former parties, and claim through  
them by some title acquired subsequently to the first trial, the evi-  
dence is admissible.<sup>3</sup> Again, if in a dispute respecting lands any  
fact comes directly in issue, the testimony given to that fact is ad-  
missible to prove the same point in another action between the same  
parties or their privies, though the last suit relate to other lands.<sup>4</sup>  
So, in criminal cases, a deposition taken on a charge either of as-  
sault and robbery, or of stabbing, or of doing grievous bodily harm,  
can, after the death of the witness, be read upon a trial for murder,  
where the two charges relate to the same transaction;<sup>5</sup> and, indeed,  
if this were not the law, the depositions of the deceased would, in  
all cases of homicide, be most improperly excluded.<sup>6</sup> In one case,<sup>7</sup>  
where a prisoner, who had been summarily convicted of an assault,  
was, in consequence of the death of the party struck, subsequently  
indicted for murder, the convicting magistrate was permitted to  
state what the deceased had sworn in the prisoner's presence, the  
examination not having been reduced in writing; but the learned  
judge appears to have received the evidence, not as proving the  
facts stated, but as producing an answer from the prisoner. So, on  
another indictment for murder, a deposition of the deceased taken  
on a prior charge of larceny against the accused was read, but this  
course was allowed, not as furnishing any evidence of the facts de-

<sup>1</sup> Gr. Ev. § 164, in part.<sup>2</sup> *Wright v. Doe d. Tatham*, 1 A. & E. 3.<sup>3</sup> Com. Dig., Ev. A. 5, explained by Littledale, J., in *Doe v. Derby*, 1 A. & E. 790; *Doe v. Powell*, 3 C. & Kir. 323.<sup>4</sup> *Doe v. Foster*, 1 A. & E. 791, n. b, per Alderson, B.; B. N. P. 232; *Llanover v. Homfray*, L. R., 19 Ch. D. 224.<sup>5</sup> *R. v. Smith*, R. & R. 339; 2 Stark. R. 208, S. C.; *R. v. Lee*, 4 Fost. & Fin. 63, per Pollock, C. B.; *R. v. Dilmore*, 6 Cox, 52, per Wightman, J.; *R. v. Beeston*, 24 L. J., M. C. 5; *Pearce & D.* 405, S. C.; *R. v. Williams*, 12 Cox, 101.<sup>6</sup> 2 Stark. R. 212, note by the reporter.<sup>7</sup> *R. v. Edmunds*, 6 C. & P. 164, per Tindal, C. J.

posed, but simply as affording a motive for revenge on the part of the prisoner.<sup>1</sup>

§ 468. If the point in issue, though very similar, was so far § 437 different in the two proceedings, that the witness, who was called to prove or disprove the issue in the former, need not have been *fully* cross-examined in regard to the matters in controversy in the latter, his deposition, if tendered on the second trial, will be excluded; and on this ground it has been held—though, perhaps, with questionable propriety—that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding.<sup>2</sup> Again,<sup>3</sup> it has been held in America, that where the issue in one action had been upon a common or free fishery, and that in another action was upon a several fishery, evidence of what a witness, since deceased, had sworn upon the former trial, was inadmissible.<sup>4</sup>

§ 469. In stating that this rule mainly depends on the right of § 433 cross-examination, care must be taken to guard against the error of imagining that, whenever a party has had the right of cross-examining a witness, he will be liable to have the statement of that witness adduced against him in any subsequent action. This will be so only in the event of *his opponent being the same in both suits*;<sup>5</sup> because, the right to use evidence, other than admissions, being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour, which, had it been tendered against him, would have been clearly inadmissible.<sup>6</sup>

§ 470. It has already been stated that secondary evidence of oral § 439 testimony cannot be received so long as the witness himself can be called; but an attempt was, some years ago, made in equity to engraft an exception on this wise rule, whenever depositions have been taken against a party in one suit, who is also a party to a

<sup>1</sup> R. v. Buckley, 13 Cox, 293, per Lush, J.

<sup>2</sup> R. v. Ledbetter, 3 C. & Kir. 108; commented upon in R. v. Beeston, 24 L. J., M. C. 5.

<sup>3</sup> Gr. Ev. § 164.

<sup>4</sup> Melvin v. Whiting, 7 Pick. 79; Jackson v. Winchester, 4 Dall. 206.

<sup>5</sup> Morgan v. Nicholl, 36 L. J., C. P. 86; 2 Law Rep., C. P. 117, S. C.

<sup>6</sup> Doe v. Derby, 1 A. & E. 783, 786.



second suit, wherein substantially the same questions arise. The case in which this point was mooted was that of *Blaggrave v. Blaggrave*.<sup>1</sup> There, a person was tenant for life of certain real and personal estate. Two suits were instituted against him in respect of alleged mismanagement of the property, the one being commenced by the tenant for life in remainder, and referring only to the real estate, the other being commenced by the first tenant in tail, and embracing both the real and the personal estate. The objects sought in each suit, though not entirely identical, were to a great extent the same. Under these circumstances it was proposed, on the authority of *Nevil v. Johnson*,<sup>2</sup> *Barton v. Palmes*,<sup>3</sup> *Byrne v. Frere*,<sup>4</sup> and particularly, the *City of London v. Perkins*,<sup>5</sup> to read as against the defendant in the second suit the depositions that had been taken against him in the first, without any proof that the witnesses were dead, or otherwise incapable of being examined. Vice-Chancellor Knight Bruce, however, very properly held that this course could not be pursued; and his decision would not have deserved any notice, had it not been that his Honour appeared to recognise the case of the *City of London v. Perkins*, as an authority to a certain extent for the doctrine propounded by the plaintiff's counsel. Now, it is submitted that this is a mistake.

§ 471. The real facts were these. The City of London, having § 439 filed a bill against Messrs. Perkins to recover certain tonnage dues under an alleged custom, claimed to read, as evidence of reputation with respect to the custom, certain depositions which had been taken by them in two former suits for the recovery of the same species of tonnage against two other defendants. The Court of Exchequer rejected this proof on the ground that the deaths of the witnesses were not shown by "the depositions taken in the cause;" and they refused to allow the plaintiffs to prove by *viva voce* testimony or by affidavit that the witnesses were in fact dead. The plaintiffs appealed, and prayed, among other things, that the order of the court below should be reversed, and that they might be at liberty to read the depositions; whereupon, the House of Lords,

<sup>1</sup> 1 De Gex & Sm. 252<sup>2</sup> 2 Vern. 247.<sup>3</sup> Prec. in Ch. 233.<sup>4</sup> 2 Moll. 157.<sup>5</sup> 3 Br. P. C. 602.

without granting or alluding to the last paragraph of the prayer, gave judgment that the order be reversed.<sup>1</sup> It is obvious, therefore, that this case does not decide that depositions can in any event be read in evidence, where the witnesses are capable of being called. Neither can such a doctrine be supported by any of the three other cases cited in *Blagrove v. Blagrove*.<sup>2</sup> In *Byrne v. Frere*,<sup>3</sup> it is clear that the witnesses were dead, and there is nothing to show that they were alive, either in *Nevil v. Johnson*,<sup>4</sup> or in *Barton v. Palmes*.<sup>5</sup>

§ 471A. Although the case of *Blagrove v. Blagrove* was clearly a right decision, the Rules of the Supreme Court, 1883, have so far relaxed the law there recognised, as to provide, by Ord. XXXVII., R. 25, that "all evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the *same cause or matter*."

§ 472. Returning now to the rule which rejects secondary § 440 evidence of oral testimony so long as the witness can himself be called, it should be observed, that the common law regards a witness as incapable of being called,—1, When he is dead; 2, When he is out of the jurisdiction of the court, or possibly, when he cannot be found after diligent inquiry; 3, When he is either insane, or seriously sick;<sup>6</sup> and 4, When he is kept out of the way by the contrivance of the opposite party. In noticing the authorities which support these propositions, no case need be cited to establish what is admitted on all hands, that if the witness be proved to be *dead*, secondary evidence of his statement on oath in a former trial between the same parties will be received.<sup>7</sup> The court, however,—unless some account of the death of a witness be given, or at least some evidence be furnished showing that proper inquiries have been made, and that no tidings can be heard of him,—will not presume his death, so as to admit his

<sup>1</sup> See and compare, 3 Br. P. C. 602, and 24 Lords' J. 448, under date 28th Jan., 1734. See, also, *Carrington v. Cornock*, 2 Sim. 567.

<sup>2</sup> 1 De Gex & Sm. 252.

<sup>3</sup> 2 Moll. 157.

<sup>4</sup> 2 Vern. 447.

<sup>5</sup> Prec. in Ch. 233.

<sup>6</sup> See post, § 506, citing Rules of Sup. Ct., 1883, Ord. XXXVII., R. 18.

<sup>7</sup> *Pyke v. Crouch*, 1 Ld. Ray. 730, 5th Res.

depositions, though they were taken as much as fifty years before the trial.<sup>1</sup>

§ 473. The ground for admitting secondary evidence in civil proceedings seems equally clear, where it is proved that the witness is actually residing in some place *beyond the jurisdiction* of the court;<sup>2</sup> but questions have occasionally arisen respecting the amount and nature of the proof required to establish this fact. Thus, where a naval captain had been examined on interrogatories by consent, on account of his expected absence, Sir James Mansfield held that it was not absolutely necessary that he should be on his voyage when the trial came on. If the ship had sailed, though it had put back, or if the witness had gone on board, and was ready to sail, though prevented by contrary winds, that would be sufficient.<sup>3</sup> The same doctrine has prevailed in another case, where the signature of an attesting witness was allowed to be proved, it appearing that he had sailed for Spain, had been driven back by stress of weather, and six days before the trial, was at Falmouth, expecting to sail again immediately.<sup>4</sup> In a third case where it is sworn that the witness was a seafaring man, and some six months before the trial had belonged to a ship lying in the Thames, Lord Ellenborough, in rejecting the evidence as too vague, was disposed to admit the depositions, if it could be further shown that any efforts had been recently made to find him.<sup>5</sup> This case suggests the propriety of noticing an old decision of the time of James the First,<sup>6</sup> in which it was expressly laid down that, if a party *cannot find* a witness, then he is, as it were, dead to him; and his depositions in a cause betwixt the same parties may be read, provided the party make oath that he endeavoured to find him, but could neither see him nor hear of him. In no modern case has precisely the same point being ruled, but as it has frequently been held that proof of inability to find an attesting

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<sup>1</sup> *Benson v. Olive*, 2 Str. 920. See ante, § 199.

<sup>2</sup> *Fry v. Wood*, 1 Atk. 445.

<sup>3</sup> *Fonsick v. Agar*, 6 Esp. 92. But see *Carruthers v. Graham, C. & Marsh.* 5, cited post, § 517.

<sup>4</sup> *Ward v. Wells*, 1 Taunt. 461. See *Varicas v. French*, 2 C. & Kir. 1008.

<sup>5</sup> *Falconer v. Hanson*, 1 Camp. 171.

<sup>6</sup> Godb. 326.

witness will let in evidence of his handwriting,<sup>1</sup> these analogous decisions would seem in some degree to support the correctness of the old authority, at least so far as relates to civil causes.

§ 474. In criminal proceedings a similar latitude is not allowable at common law, and the deposition of a witness, whether taken before a magistrate or a coroner, will not be rendered admissible, on mere proof that the witness himself cannot be found after diligent search.<sup>2</sup> Neither will it be received, though satisfactory proof be given that the witness was not absent from any intention to defeat justice, but that, being a foreigner, he had, since the prisoner was committed for trial, returned to his own country, and was at the time of the trial resident abroad.<sup>3</sup> This kind of evidence has also been rejected in America, both where the witness could not be found within the jurisdiction, but was reported to have gone to an adjoining State,<sup>4</sup> and where he was proved to have left the State, after being summoned to attend at the trial.<sup>5</sup> § 442

§ 475. How far *answers to inquiries* respecting the witness are admissible to prove that he cannot be found, is not very clearly defined by the decisions. That such answers will be rejected as hearsay, if tendered in proof of the fact that the witness is abroad is beyond all doubt,<sup>6</sup> but where the question is simply whether a diligent and unsuccessful search has been made for the witness, it would seem, both on principle and authority, that the answers should be received, as forming a prominent part of the very point to be ascertained.<sup>7</sup> In order to show that inquiries § 443

<sup>1</sup> *Kay v. Brookman*, 3 C. & P. 555; *Cunliffe v. Sefton*, 2 East, 183; *Crosby v. Percy*, 1 Taunt. 364; *Ld. Falmouth v. Roberts*, 9 M. & W. 469; *Parker v. Hoskins*, 2 Taunt. 223; *Burt v. Walker*, 4 B. & A. 697; *Spooner v. Payne*, 4 Com. B. 328.

<sup>2</sup> *Ld. Morley's case*, Kel. 55, 6th Res.; 6 How. St. Tr. 771, S. C.; *R. v. Scaife*, 17 Q. B. 242—244; 2 Den. 281, S. C.

<sup>3</sup> *R. v. Austen*, Pearce & D. 612; 7 Cox, 55, S. C.; *R. v. Hagan*, 8 C. & P. 167. These cases overrule the law as laid down in B. N. P. 242.

<sup>4</sup> *Wilbur v. Selden*, 6 Cowen, 162.

<sup>5</sup> *Finn's case*, 5 Rand. 701.

<sup>6</sup> *Robinson v. Markis*, 2 M. & Rob. 375, per *Ld. Abinger*; *Doe v. Powell*, 7 C. & P. 617, per *id.*; post, § 517.

<sup>7</sup> *Wyatt v. Bateman*, 7 C. & P. 586, per *Coleridge, J.*; *Burt v. Walker*, 4 B. & A. 697; *Austin v. Rumsey*, 2 C. & Kir. 736, per *Erle, J.*

have been duly made at the house of the witness, his declarations as to where he lived cannot be received;<sup>1</sup> neither will his statement in the deposition itself, that he is about to go abroad, render it unnecessary to prove that he has put his purpose in execution.<sup>2</sup>

§ 476. If the witness be proved at the trial to be *insane*, his deposition will be admissible,<sup>3</sup> in like manner as if he were dead;<sup>4</sup> and the same rule is stated to prevail, though the insanity be only of a temporary character.<sup>5</sup> This, however, appears to be carrying the doctrine beyond its legitimate extent; for since the casual illness of a witness will not,—as shown in the next section,—warrant the reading of his former testimony, at least in a civil suit, but will only furnish good ground for moving to postpone the trial, the same rule should surely prevail in the event of a witness being afflicted with temporary madness. No sensible distinction can be drawn between the two cases. Where depositions are tendered on the ground of the witness being insane, it may sometimes be advisable to show that his intellects were sound at the time of his previous examination; and this course may even be necessary, if such examination were had but a short time before the trial.<sup>6</sup>

§ 477. It is somewhat difficult to discover from the authorities what *degree of illness* must be proved in order to let in depositions.<sup>7</sup> In an old case, where a witness on his journey to the place of trial was taken so ill as to be unable to proceed, his deposition was allowed to be read;<sup>8</sup> but too much weight must not be given to this decision, since, if the course there adopted were ordinarily allowed, there would be very sudden indispositions and recoveries.<sup>9</sup> The rule laid down by Lord Ellenborough, that where a witness is taken

<sup>1</sup> Doe v. Powell, 7 C. & P. 617.

<sup>2</sup> Proctor v. Lainson, 7 C. & P. 631, per Ld. Abinger.

<sup>3</sup> As to depositions taken by committing justices, see post, § 479.

<sup>4</sup> R. v. Eriswell, 3 T. R. 720, 721, per Ashhurst, J., and Ld. Kenyon.

<sup>5</sup> R. v. Marshall, C. & Marsh. 147, per Ludlow, S., after consulting Coltman, J.

<sup>6</sup> R. v. Wall, per Park, J., cited 2 Russ. C. & M. 890.

<sup>7</sup> See R. v. Bull, 12 Cox, 31. See Rules of Sup. Ct., 1883, Ord. XXXVII., R. 18, cited post, § 506.

<sup>8</sup> Luttrell v. Reynell, 1 Mod. 284.

<sup>9</sup> Harrison v. Blades, 3 Camp. 458, per Ld. Ellenborough; Jones v. Brewer, 4 Taunt. 47, per Heath, J.

ill, the party requiring his testimony should move to *put off the trial*, is certainly less open to objection and abuse.<sup>1</sup> In the criminal courts, this practice has long prevailed, and it has there been expressly decided, that the depositions of a woman, who was so near her confinement as to be unable to attend a trial, could not be received.<sup>2</sup> If, however from the nature of the illness or other infirmity, no reasonable hope remains that the witness will be able to appear in court on any future occasion, his deposition is certainly admissible in criminal,<sup>3</sup> as it is in civil,<sup>4</sup> proceedings. Where, upon an issue being directed out of the old Court of Chancery, it appeared that a witness, who had been examined in the cause as to the handwriting of certain documents, had since become *blind*, the court made an order that his depositions should be read at the trial.<sup>5</sup>

§ 478. The proposition that, if a witness be *kept out of the way* § 446 by the adversary, his former statements on oath will be admissible, rests, partly, on the authority of several decisions both in the civil and criminal courts;<sup>6</sup> partly, on the analogies furnished by one or two statutes;<sup>7</sup> but chiefly, on the broad principle of justice, which will not permit a party to take advantage of his own wrong. In a case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the court held that his deposi-

<sup>1</sup> *Harrison v. Blades*, 3 Camp. 458.

<sup>2</sup> *R. v. Savage*, 5 C. & P. 143, per Patteson, J. See post, § 481.

<sup>3</sup> 11 & 12 V., c. 42, § 17, cited post, § 479; *R. v. Hogg*, 6 C. & P. 176, per Gurney, B.; *R. v. Edmunds*, id. 165, per Tindal, C. J.; *R. v. Wilshaw*, C. & Marsh. 145; *R. v. Cockburn*, Dear. & Bell, 203; 7 Cox, 265, S. C., cited post, p. 435, n. 2.

<sup>4</sup> *Jones v. Jones*, 1 Cox, Ch. R. 184; *Andrews v. Palmer*, 1 Ves. & B. 22; *Fry v. Wood*, 1 Atk. 445; *Corbett v. Corbett*, id. 335, 336. The case of *Doe v. Evans*, 3 C. & P. 219, where Vaughan, J., is said to have rejected the depositions of a witness, who was bed-ridden and nearly a century old, and quite unable to attend the trial, is obviously not law.

<sup>5</sup> *Lynn v. Robertson*, 2 Coop. 217.

<sup>6</sup> *Ld. Morley's case*, Kel. 55, 5th Rea.; 6 How. St. Tr. 770, 771, S. C.; *R. v. Harrison*, 12 How. St. Tr. 851, 852, 868, per Ld. Holt; *Green v. Gatewick*, B. N. P. 243; *R. v. Scaife*, 2 Den. 281; 17 Q. B. 238, S. C.; *R. v. Guttridge*, 9 C. & P. 473. See, also, *Egan v. Larkin*, 1 Arm. M. & O. 403, per Brady, C. B.

<sup>7</sup> See 50 G. 3, c. 102, § 5, Ir.; 56 G. 3, c. 87, § 3, Ir., noticed post, § 497.

tion might be read in evidence as against the man who had kept him out of the way, but that it could not be received against the other two men.<sup>1</sup>

§ 479. Besides those cases, in which the admissibility of § 447  
secondary proof of oral testimony is found to rest upon the ordinary principles of the common law, the Legislature in a few instances has expressly provided, that certain depositions should, under particular circumstances, be received in evidence.<sup>2</sup> The most important Act on this subject is that of 11 & 12 V., c. 42, which regulates the mode of taking depositions before committing magistrates, and their subsequent admissibility in evidence. § 17 of this statute enacts, "That in all cases, where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high sea, or on land beyond the sea, or whether such person appear voluntarily, upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, *in the presence of such accused person*, who shall be at liberty to put questions to any witness produced against him, take the statement<sup>3</sup> on oath or affirmation of those who shall know the facts and circumstances of the case, and

<sup>1</sup> R. v. Scaife, 2 Den. 281; 17 Q. B. 238; 5 Cox, 243, S. C.

<sup>2</sup> See "The Fugitive Offenders Act, 1881," 44 & 45 V., c. 69, § 29, cited post, § 1562.

<sup>3</sup> The form given Sched. M to the Act is as follows:—

*Depositions of Witnesses.*

"To Wit,—The examination of C. D. of [Farmer] and E. F. of [Labourer], taken on [oath] this            day of            in the year of our Lord at            in the [county] aforesaid, before the undersigned, [one] of Her Majesty's Justices of the Peace for the said [county], in the presence and hearing of A. B.; who is charged this day before [me], for that he the said A. B. on            at            [&c., describing the offence as in a warrant of commitment]. This deponent C. D. on his [oath] saith as follows [&c., stating the deposition of the witness as nearly as possible in the words he uses. When his deposition is complete, let him sign it.]

And this deponent E. F. upon his oath saith as follows [&c.].

The above depositions of C. D. and E. F. were taken and [sworn] before me at            on the day and year first above mentioned.            T. S."

shall put the same into writing, and such depositions shall be *read over* to and *signed* respectively by the *witnesses* who shall have been so examined, and shall be *signed* also by the *justice* or justices taking the same ; and the justice or justices, before whom any such witnesses shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do ; and if, upon the trial of the person so accused as first aforesaid, it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid, is *dead*, or *so ill as not to be able to travel*, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity<sup>1</sup> of cross-examining the witness, then, if such deposition *purport* to be *signed* by the *justice* by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

§ 480. It would be difficult to frame a clause open to more <sup>2</sup> 448 objections than the one just cited. First, the Act states, that if it be proved, among other things, that the witness "is dead, or so ill as not to be able to travel," it shall be lawful to read his deposition as evidence in the prosecution. Now, any one, bearing in mind the maxim, "*expressio unius est exclusio alterius*," would reasonably interpret this to mean that, unless one or other of these facts be established, the deposition shall in all cases be excluded ; but, as such an interpretation would lead to very absurd results, the judges have put another construction on the words, and have held that they do not annul the wise common-law rule,<sup>3</sup> that if a witness be fraudulently or forcibly kept out of the way by the prisoner himself, his deposition shall be received.<sup>3</sup>

<sup>1</sup> This fact may be negatived by proof that the accused was insane when the deposition was taken, or was otherwise incapacitated by illness from cross-examining the deponent. *R. v. Peacock*, 12 Cox, 21, per Brett & Mellor, J.

<sup>2</sup> Ante, § 478.

<sup>3</sup> *R. v. Scaife*. 2 Den. 281 ; 17 Q. B. 238 ; 5 Cox, 243, S. C.



In thus deciding, the judges have certainly got rid of one difficulty; but since, in so doing, they have relaxed the principles of judicial interpretation, the law, regarded as a science, has lost almost as much as it has gained. Whether the courts will go one step further, and admit the deposition of a witness, who, although not too ill to travel,<sup>1</sup> may be proved to be permanently insane,<sup>2</sup> remains to be seen; but such a decision seems naturally to follow from the former ruling.

§ 481. Next, do the words just cited mean, that in all cases where a witness is too ill to travel at the time of the trial, his deposition, if proved to have been properly taken, must be admitted in evidence; or, in other words, do they set at nought the salutary practice of obliging the prosecutor to apply for a postponement of the trial,<sup>3</sup> where a material witness is only suffering under a *temporary* indisposition? Such appears to be the only construction that can fairly be put upon the Act; and, consequently, the court has admitted the deposition of a woman who, when the trial took place had just been confined,<sup>4</sup> though it was urged with much force that in a very few weeks the woman would almost certainly be able to testify *viva voce* in court.<sup>5</sup> What

<sup>1</sup> When a witness is able to travel without risk, her old age and nervousness and inability to stand a cross-examination will not justify the reading of her deposition. *R. v. Farrell*, 43 L. J., M. C. 94; 12 Cox, 605; & 2 Law Rep., C. C. 116, S. C.; *R. v. Thompson*, 13 Cox, 181, per Lush, J.

<sup>2</sup> Ante, § 476. In *R. v. Cockburn*, *Dear. & Bell*, 203; 7 Cox, 265, S. C., the deposition of a witness was received, on his doctor proving, that, though he might have been brought to the court without danger to life, he was suffering from paralysis, which disabled him altogether from giving evidence. See, also, *R. v. Wilson*, 8 Cox, 453.

<sup>3</sup> Ante, § 477.

<sup>4</sup> So, in *R. v. Stephenson*, 31 L. J., M. C. 147; *L. & Cave*, 165; and 9 Cox, 156, S. C., the court admitted the deposition of a woman, who was daily expecting her confinement, and was "otherwise poorly." See, too, *R. v. Croucher*, 3 Fost. & Fin. 285; *R. v. Wilson*, 12 Cox, 622; *R. v. Heesom*, 14 Cox, 40, per Lush, J.; and *R. v. Goodfellow*, 14 Cox, 326, per Bowen, J.; *R. v. Wellings*, L. R., 3 Q. B. D. 426; 14 Cox, 105; and 47 L. J., M. C. 100, S. G. In these last three cases the woman was daily expecting her confinement.

<sup>5</sup> *R. v. Harvey*, 4 Cox, 441. But see *R. v. Omant*, 6 Cox, 466, per Crompton, J.; *R. v. Wilton*, 1 Fost. & Fin. 309, per Willes, J.; *R. v. Walker*, id. 534, per id.; *R. v. Tait*, 2 Fost. & Fin. 553, per Crompton, J., from which cases it appears that the judge, notwithstanding the Act, has a discretionary power of postponing the trial, instead of allowing the deposition to be read.

renders this state of the law the more remarkable is, that if, instead of the woman's deposition having been offered in evidence in a criminal case, her examination before a commissioner had been tendered in a civil suit—at least before the Rules of the Supreme Court came into operation,<sup>1</sup>—it could not have been received; for, as previously shown,<sup>2</sup> an examination taken at common law could not have been read in evidence on the ground of the sickness or other infirmity of the witness, unless it were proved that such sickness or infirmity was of a *permanent* character.

§ 482. Again, what amount of proof will authorise the reading of the deposition? Will it suffice simply to show that the witness is dead, or too ill to travel; that he was examined in the presence of the accused, who had a full opportunity of cross-examining him; and that the document purports to be signed, either by the committing justice, or, at least, by the justice “by or before whom the same purports to have taken place?”<sup>3</sup> or must the prosecutor further prove all or any of the following facts, viz., that the deposition was taken before the accused was committed or bailed; that it was taken on oath or affirmation; that it was read over to the witness, and that it was signed by him? The clause enumerates all these circumstances as apparently necessary ingredients in a valid deposition; and then, in the paragraph relative to the proof, speaks, first, of “the person, whose deposition *shall have been taken as aforesaid*,” being dead, &c., and next, of “*such* ‘deposition’” purporting to be signed by the justice. If it be contended that the court will infer from the magistrate's signature that the statutory provisions have all been complied with, the form of the caption of the deposition, as given in the schedule to the Act,<sup>4</sup> furnishes a probable answer to such an argument: for by that

<sup>1</sup> See post, § 516.

<sup>2</sup> Ante, §§ 472, 477.

<sup>3</sup> In *R. v. Vidil*, 9 Cox, 4, Blackburn, J., held that the deposition of a sick witness was admissible, though it had been taken before two magistrates who acted only on that occasion, and though the prisoner had been charged before and committed by another magistrate. Sed qu.

<sup>4</sup> As to the meaning of the word “such,” see per Ld. Brougham in *Case-ment v. Fulton*, 5 Moo. P. C. R. 140.

<sup>5</sup> Ante, § 479, n. 3.

form the justice merely states that the witness was examined on oath, and in the presence of the accused, and it is wholly silent as to whether or not the examination was read over to the witness, or was signed by him. Now, as the magistrates's signature is clearly insufficient to prove that the accused was present during the examination of the witness, though that fact is positively stated in the caption so attested, on what ground can it be urged that the same signature is sufficient to prove the taking of the oath, which is a fact stated in the caption in a precisely similar manner? At all events, how can the facts that the deposition was read over to the witness, and that it was afterwards signed by him, be proved by the magistrate's signature, when neither of these circumstances is so much as alluded to in any part of the document? In short, if the signature of the magistrate does not authenticate the facts which *are* recited in the caption, how can it authenticate facts which *are not* there recited at all?

§ 483. A further difficulty arises on determining what amount of proof on the part of the prisoner will render a deposition inadmissible? If he can show that the signature, purporting to be that of the justice, is a forgery, of course the deposition cannot be received. But how will the case stand, if, being unable to prove that fact, he can still show that the deposition was not taken upon oath, or that it was not read over to the witness, or that the signature purporting to be that of the witness was not made by him, or that the witness had refused or omitted to sign the statement? Will he be allowed to adduce such evidence, and will such evidence, if adduced, avail him? These are, all of them, points which cannot fail to raise serious difficulties in interpreting the Act, and which might easily have been avoided had the draftsman possessed ordinary knowledge of the subject, or exercised ordinary care. § 451

§ 484. Passing now from these speculative questions, it will be convenient to consider briefly the *proper course of taking depositions* under the Act. And here it seems clearly to have been intended by the Legislature, that the accused should be charged, in the first instance, with some indictable offence; that § 452

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the statement of each witness should then be made under the sanction of an oath or affirmation, administered by the magistrate before whom the charge is preferred;<sup>1</sup> that such oath or affirmation should be administered in the presence of the accused; that the statement should be made entirely in his presence,<sup>2</sup> and that he should have full opportunity for cross-examination; that the whole of the statement elicited either by examination or by cross-examination, and not merely so much of the evidence as the justice might consider *material*,<sup>3</sup> should be reduced to writing in the first person, and in the very words of the witness,<sup>4</sup> that the deposition, when completed, should be read over to the witness, and be signed by him, as a token of his assenting to its correctness;<sup>5</sup> that the whole body of the depositions, if not each deposition,<sup>6</sup> should also be signed by the justice, and that they should be transmitted by him,—together with the written information, the statement of the accused, and the recognizance of bail, if any such documents should exist,—to the proper officer of the court in which the trial is to be had, before or at the opening of such court.<sup>7</sup>

§ 485. In directing the magistrate to take down the statements of the witnesses as nearly as possible in their own words, and not merely “so much thereof as shall be material,” the Legislature, of course, did not intend that the depositions should be loaded with every idle word let fall by the persons under examination, though obviously having no reference to the charge against the accused, but it certainly meant to fetter the discretion of the justices, who, under the old law, were apt to reject as immaterial much valuable information. Regarded in this light, the change is salutary; for not only does it frequently happen, that facts,

<sup>1</sup> See *R. v. Vidil*, 9 Cox, 4, cited ante, § 482, n. <sup>3</sup>

<sup>2</sup> The same doctrine prevailed at common law. See *R. v. Errington*, 2 Lew. C. C. 142; *R. v. Woodcock*, 1 Lea. 502; *R. v. Dingler*, 2 Lea. 561; *R. v. Paine*, 1 Salk. 281; 5 Mod. 163, S. C., cited with approbation by Id. Kenyon in *R. v. Eriswell*, 3 T. R. 723.

<sup>3</sup> This was the old law: see 7 G. 4, c. 64, §§ 2 & 3.

<sup>4</sup> See *Sch. M.* cited ante, § 479, n. <sup>3</sup>

<sup>5</sup> See *R. v. Plummer*, 1 C. & Kir. 604; *R. v. Flemming*, 2 Lea. 854.

<sup>6</sup> See § 487, post.

<sup>7</sup> See §§ 17 & 20 of 11 & 12 V., c. 42.

which on a preliminary inquiry appear to be of trifling importance, turn out in the sequel to be extremely relevant but, where all the evidence is not given, the court, the prosecutor, and the prisoner, are alike kept in the dark, and much time may be wasted in endeavours to throw discredit upon the testimony of witnesses, by showing that they have made statements at the trial which are not to be found in the depositions returned.<sup>1</sup> If a person of weak intellect, or a child, be examined before the justice, it is also desirable that the questions and answers touching his capacity to take an oath, should appear on the face of the deposition.<sup>2</sup>

§ 486. Whether a deposition originally written down in the absence of the prisoner could be received in evidence under the Act, on proof being given that it had afterwards been read over in his presence to the witness, who had then assented on oath to its contents, is a very problematical question; for although depositions, thus laxly taken, have more than once been admitted under the old law,<sup>3</sup> this course of proceeding has frequently been condemned by the judges as highly unjust;<sup>4</sup> and, indeed, it is obvious that it affords no fair opportunity to the accused of cross-examining the deponent. On one occasion, Mr. Baron Platt rejected a deposition expressly upon this ground; and, at the same time, took occasion to remark, that a prisoner could not have "a full opportunity of cross-examining the witness," within the meaning of the statute, unless the deposition was taken down in his presence, and in the presence of the magistrate, and unless he was warned by the magistrate at the close of the examination that

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<sup>1</sup> *R. v. Potter*, 7 C. & P. 650, n.; *R. v. Thomas*, id. 817; *R. v. Grady*, id. 650; *R. v. Smith*, 2 C. & Kir. 207; *R. v. Weller*, id. 223.

<sup>2</sup> *R. v. Painter*, 2 C. & Kir. 319, per Wilde, C. J.

<sup>3</sup> *R. v. Smith*, R. & R. 339; 2 Stark. R. 208; Holt, N. P. R. 614, S. C.; *R. v. Calvert*, 2 Cox, 491; *R. v. Walsh*, 5 id. 115. See *R. v. Christopher*, 4 Cox, 76; 2 C. & Kir. 994; 1 Den. 536, S. C.

<sup>4</sup> *R. v. Johnson*, 2 C. & Kir. 394, per Platt, B.; *R. v. Forbes*, Holt, N. P. R. 599, n., per Chambre, J.; *R. v. Kiddy*, 4 D. & R. 734; *R. v. Calvert*, 2 Cox, 492, per Rolfe, B.; *R. v. Walsh*, 5 id. 115; *R. v. Beeston*, 24 L. J., M. C. 6, per Alderson, B.; *Pearce & D.* 408, S. C. See, also, *R. v. Crowther*, 1 T. R. 125.

he might put any questions he liked to the witness, with reference to the statement which had been made.<sup>1</sup>—It is also extremely doubtful whether a deposition can be read in a case, where the prisoner has abstained from asking any question in consequence of the witness being too ill to bear further examination.<sup>2</sup>

§ 487. With respect to the mode of entitling the depositions, § 455 one caption at the head of the whole body of depositions will suffice,<sup>3</sup> if, indeed, it be necessary in strict law,<sup>4</sup> to have a caption at all;<sup>5</sup> and no objection can be sustained on the ground that the title does not state with sufficient precision the charge against the accused.<sup>6</sup> Although each witness must sign his own deposition, it will be sufficient for the magistrate to attach his signature, once for all, at the end of the whole body of depositions, provided that all of them be written either on one sheet of paper,<sup>7</sup> or on different sheets connected with each other.<sup>8</sup> Still, this course of proceeding should not be indiscriminately adopted; for, if the depositions be copied on separate sheets, and no proof be given of their having been pinned, or otherwise fastened together, at or before the time when the last was signed,<sup>9</sup> those bearing no signature will be rejected.<sup>10</sup> It seems, too, that the signature of the justice must appear on the face of the deposition to be that of the magistrate “by, or before, whom the same purports to have been taken,” and that no parol evidence will be received to supply any

<sup>1</sup> *R. v. Day*, 6 Cox, 55. See *R. v. Bates*, 2 Fost. & Fin. 317; *R. v. Watts*, 3 New R. 177; 33 L. J., M. C. 63; *L. & Cave*, 339; 9 Cox, 395, S. C.

<sup>2</sup> *R. v. Hyde*, 3 Cox, 90.

<sup>3</sup> *R. v. Johnson*, 2 C. & Kir. 355, per Alderson, B.

<sup>4</sup> See, however, *R. v. Newton*, 1 Fost. & Fin. 641; and *R. v. Galvin*, 16 Ir. Law R., N. S. 452; 10 Cox, 198, S. C., in which last case the Irish Judges were almost equally divided upon the point.

<sup>5</sup> *R. v. Langbridge*. 1 Den. 448; 2 C. & Kir. 975, S. C.

<sup>6</sup> *Id.*

<sup>7</sup> *R. v. Young*, 3 C. & Kir. 106; *R. v. Osborne*, 8 C. & P. 113, per Coleridge, J., and *Ld. Abinger*.

<sup>8</sup> *R. v. Parker*, 1 Law Rep., C. C. 225; 11 Cox, 478; 39 L. J., M. C. 60, S. C.; overruling *R. v. Richards*, 4 Fost. & Fin. 860. See, also, *R. v. Carroll*, 11 Cox, 322, per Hannen, J.

<sup>9</sup> See *R. v. Lee*, 4 Fost. & Fin. 65, per Pollock, C. B.

<sup>10</sup> *R. v. France*, 2 M. & Rob. 207, per Alderson and Parke, Bs.

omission on this head.<sup>1</sup> The depositions, when admissible under the Act, may be read in evidence before the grand jury as well as at the actual trial.<sup>2</sup>

§ 488. Although, as before stated,<sup>3</sup> many points may arise § 456 respecting the proper mode of proving depositions under the statute, thus much appears to be quite clear, that it is no longer necessary, as formerly was the case, to verify the signature of the magistrate. This change, however, is productive of no real advantage; for as proof must certainly be adduced "that the deposition was taken in the presence of the accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witness," it is obvious that either the justice or his clerk, or at least some person who was present during the whole inquiry,<sup>4</sup> must be forthcoming, in order to show that the forms of law have been duly complied with. When the deposition is sought to be read on the ground of the sickness of the witness, it must, of course, be proved that he is at the actual time of the trial too ill to travel; and the judges, very properly, seem inclined to hold that this fact should be strictly established.<sup>5</sup> Mere proof that the witness was confined to his bed some days before will not suffice;<sup>6</sup> and, as a general rule, it will be prudent,<sup>7</sup> though it is not absolutely necessary,<sup>8</sup> to have the testimony of a medical man.

§ 489. It may here be convenient to repeat,—what was mentioned § 457 before in another connexion,<sup>9</sup>—that a deposition will be admissible

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<sup>1</sup> *R. v. Miller*, 5 Cox, 166, per Maule, J.

<sup>2</sup> *R. v. Clements*, 2 Den. 251; 5 Cox, 191, S. C.

<sup>3</sup> Ante, §§ 482, 483.

<sup>4</sup> See *R. v. Wilshaw*, C. & Marsh. 145; *R. v. Wilson*, 12 Cox, 622.

<sup>5</sup> See *R. v. Harris*, 4 Cox, 440; *R. v. Ulner*, id. 442; *R. v. Riley*, 3 C. & Kir. 116; see, also, *R. v. Day*, 6 Cox, 55.

<sup>6</sup> *R. v. Riley*, 3 C. & Kir. 116; *R. v. Williams*, 4 Fost. & Fin. 515, per Pigott, B.

<sup>7</sup> *R. v. Riley*, 3 C. & Kir. 116; *R. v. Welton*, 9 Cox, 296, per Byles, J.; *R. v. Williams*, 4 Fost. & Fin. 515, per Pigott, B.

<sup>8</sup> *R. v. Stephenson*, 31 L. J., M. C. 147; *L. & Cave*, 165; 9 Cox, 156, S. C.; *R. v. Croucher*, 3 Fost. & Fin. 285, per Bramwell, B.

<sup>9</sup> Ante, § 467.

under this Act, though it was taken upon a charge technically different from that in respect of which the accused is afterwards indicted, provided that on the former inquiry a full opportunity of cross-examination has been afforded to him. For instance, the deposition of a deceased person, taken on a charge against the prisoner of having stabbed him, or done him some grievous bodily harm, can be read on a subsequent trial for his murder or manslaughter.<sup>1</sup>

§ 490. In addition to the regulations for taking depositions, § 457.<sup>1</sup> which are to be found in § 17 of 11 & 12 V., c. 42,<sup>2</sup> an Act was passed in 1867,<sup>3</sup> which contains two enactments of some importance relative to this subject. The first<sup>4</sup> provides, in sub-

<sup>1</sup> *R. v. Beeston*, 24 L. J., M. C. 5; *Pearce & D.* 405, S. C.; *R. v. Dilmore*, 6 Cox, 52, per Wightman, J.; *R. v. Lee*, 4 Fost. & Fin. 63, per Pollock, C. B.; *R. v. Williams*, 12 Cox, 101. See *R. v. Clarke*, 2 Fost. & Fin. 2.

<sup>2</sup> Ante, § 479.

<sup>3</sup> 30 & 31 V., c. 35.

<sup>4</sup> § 3 enacts, that "in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed within this realm or upon the high seas or upon land beyond the seas, and whether such person appear voluntarily upon summons, or has been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person for trial or admit him to bail, shall, immediately after obeying the directions of the eighteenth section of the Act eleventh and twelfth Victoria, chapter forty-two, demand and require of the accused person whether he desires to call any witness; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing; and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions; and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case, or tending to prove the innocence of the accused person, shall be bound by recognisance to appear and give evidence at the said trial; and afterwards, upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken."



stance, that every person, who is charged before a justice with an indictable offence, shall be asked whether he desires to call any witnesses; and, if he does so, the justice, in his presence, shall examine such witnesses on oath, and reduce their statements to writing. The depositions thus taken shall then be read over to the witnesses and signed by them, and shall also be countersigned by the justice, and "transmitted in due course of law;" and, afterwards, upon the trial, all the laws relating to the depositions of witnesses for the prosecution shall apply to these depositions.

§ 491. The other enactment<sup>1</sup> is intended to provide means for § 457B  
perpetuating the testimony of witnesses, who, being dangerously ill and unable to travel, can yet give material information relating to some indictable offence, or to some person accused of such crime. It is very inartistically drawn, and the lawyer would be more remarkable for courage than for wisdom who would venture to put a legal interpretation on its ambiguous phraseology. Let it speak for itself as follows:—"Whereas, by § 17 of 11 & 12 V., c. 42, it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition, taken in accordance with the provisions of the said Act, of a witness who is dead, or so ill as to be unable to travel; and whereas, it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused

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§ 4 also enacts, that "all the provisions of the said Act eleventh and twelfth Victoria, chapter forty-two, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognisance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and shall have operation as part of this Act."

<sup>1</sup> 30 & 31 V., c. 35, § 6.

person, and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed, and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen

to be present, full opportunity of cross-examining the deceased person who made the same."<sup>1</sup>

§ 492. The depositions of witnesses, who are examined before § 458 the coroner, are rendered admissible as secondary proof, by virtue of the Act of 7 G. 4, c. 64, which in § 4 enacts, "That every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or *as much thereof as shall be material*, and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall *certify and subscribe* the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court."<sup>2</sup>

§ 493. It may be doubtful whether these provisions have not § 459 been repealed by § 84 of 11 & 12 V., c. 42;<sup>3</sup> but assuming that they are still in force, it will be seen that they differ materially from those which regulate the mode of taking depositions before justices, and of proving them when taken. In the first place, the

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<sup>1</sup> § 7 enacts, that "whenever a prisoner in actual custody shall have served, or shall have received, notice of an intention to take such statement as hereinafore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement, and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner shall have been conveyed."

<sup>2</sup> See 9 G. 4, c. 54, § 4, which contains similar provisions for Ireland.

<sup>3</sup> See *R. v. Cleary*, 2 Fost. & Fin. 850, 852.

coroner is only required to put in writing "so much of the evidence as shall be material;" secondly, the narrative may be drawn up in the third person; thirdly, the witness is not required to sign the document, though he usually does so for the purpose of identifying it;<sup>1</sup> fourthly, the deposition must, it would seem, be proved, either by calling the coroner who subscribed it, or by proving his signature thereto, and showing by his clerk, or by some person who was present at the inquiry, that the forms of law have been duly complied with.<sup>2</sup>

§ 494. Another striking *distinction* is said to exist between de- § 400  
positions returned by justices and those taken by coroners. The former, to be admissible as secondary evidence against the prisoner, must have been taken in his presence, but it is alleged that the latter will be received, though taken in his absence. This doctrine appears to rest on two or three decisions of the date of Charles II.,<sup>3</sup> which are capable of a far more limited interpretation, and are, moreover, entitled to little consideration, as having been pronounced at a time when the rules of evidence were only partially understood;—on dicta thrown out by Ld. Kenyon and Mr. Justice Buller in *R. v. Eriswell*;<sup>4</sup>—on a note of a case said to have been decided by Mr. Baron Hotham,<sup>5</sup>—and on a ruling by Mr. Justice Coleridge,<sup>6</sup> the soundness of which it would be difficult to establish. The opposite doctrine is not only ably supported by Messrs. Starkie,<sup>7</sup> Phillipps,<sup>8</sup> and Russell,<sup>9</sup> but it has of late years been acted on by Mr. Justice Montague Smith,<sup>10</sup> and it appears to be so consistent with sound principle as to insure its recognition, should the question be solemnly discussed in modern times.<sup>11</sup>

§ 495. Two other statutes, which regulate the admissibility of § 461

<sup>1</sup> See *R. v. Flemming*, 2 Lea. 854.

<sup>2</sup> See *R. v. Wilshaw*, C. & Marsh. 145.

<sup>3</sup> *Ld. Morley's case*, Kel. 55; 6 How. St. Tr. 776, S. C.; *Bromwich's case*, 1 Lev. 180; *Thatcher v. Waller*, T. Jones, 53; *R. v. Harrison*, 12 How. St. Tr. 852.

<sup>4</sup> 3 T. R. 713, 722.

<sup>5</sup> *R. v. Purefoy*, Pea. Ev. 61, n. 5th ed.

<sup>6</sup> *Sills v. Brown*, 9 C. & P. 601.

<sup>7</sup> 2 St. Ev. 384—386.

<sup>8</sup> 2 Ph. Ev. 74, 75.

<sup>9</sup> 2 Russ. C. & M. 892, 898.

<sup>10</sup> *R. v. Rigg*, 4 Fost. & Fin. 1085.

<sup>11</sup> See *R. v. Wall*, 2 Russ. C. & M. 893, n. c.

certain depositions, are the Bankruptcy Act, 1883,<sup>1</sup> and the Irish Bankrupt and Insolvent Act, 1857.<sup>2</sup> The one enacts, in § 136, that "in case of the *death* of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a *copy* thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to." The other enacts, in § 365, that, in the event of the *death* of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any bankruptcy heretofore or hereafter, or under any petition for arrangement, his deposition, purporting to be sealed with the seal of the Court of Bankruptcy, or a *copy* thereof purporting to be so sealed, shall in all cases be received as evidence of the matters therein respectively contained.

§ 496. The Irish Act of 50 G. 3, c. 102,—after the humiliating § 463 recital, that men, who have given information against persons accused of crimes in Ireland, have been murdered before the trial, in order to prevent their giving evidence, and to effect the acquittal of the accused,—enacts, in § 5, that if any person, after giving information or examination upon oath against any person for any offence, shall, before the trial, be murdered or violently put to death, or so maimed, or forcibly carried away and secreted, as not to be able to give evidence on the trial, his information or examination shall be admitted in all courts of justice in Ireland as evidence on the trial; provided (and this is a remarkable proviso, since it differs from the ordinary rule of law on the subject<sup>3</sup>), that the information or examination of a witness secreted shall not be evidence, unless it shall be found on a collateral issue, to be put to the *jury* trying the prisoner, that he was secreted by the person on trial, or by some person acting for him, or in his favour. By the subsequent stat. 56 G. 3, c. 87, § 3, Ir., informations, or examinations, under similar circumstances, and after similar proof are rendered receivable in evidence before the grand jury.

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<sup>1</sup> 46 & 47 V., c. 52.

<sup>2</sup> Ante, § 23.  
(3315)

<sup>3</sup> 20 & 21 V., c. 60, Ir.

§ 499. The preceding observations have been confined to cases § 465  
 where the oral testimony has been given, either in some different  
 suit from that in which the secondary evidence is tendered, or in a  
 different stage of the same legal proceedings; but it now becomes  
 necessary to advert to several Acts of Parliament, and Rules of Court,  
 which have intrenched upon the common law rule, requiring 'the  
 examination of witnesses to be *viva voce* in the presence of the  
 jury, and which have, under certain circumstances, substituted for  
 such examination the depositions of witnesses, who have been pre-  
 viously examined in the cause.

§ 500. The first Act relative to this subject was passed in the § 466  
 year 1773,<sup>1</sup> and by § 40 provides, that in all cases of *indictments*  
 or *informations* laid or exhibited in what is now called the *Queen's*  
*Bench* Divisions of the High Court for *misdemeanors* or *offences com-*  
*mitted in India*, it shall be lawful for the said court, upon motion to  
 be made on behalf of the prosecutor<sup>2</sup> or defendant, to award a writ  
 of mandamus, requiring the chief justice and judges<sup>3</sup> of the respec-  
 tive High Courts of Judicature at Fort William, or Madras, or  
 Bombay,<sup>4</sup> to hold a court, with all convenient speed, for the exami-  
 nation of witnesses, and receiving other proofs concerning the  
 matters charged in such indictments or informations; and, in the  
 meantime, to cause such public notice to be given of the holding of  
 the said court, and to issue such summons or other process as may  
 be requisite for the attendance of the witnesses, agents, or counsel  
 of the parties, and to adjourn from time to time as occasion may  
 require; and such examination shall be publicly taken *viva voce* in  
 the said court, upon the oaths of witnesses, and the oaths of skilful  
 interpreters, administered according to the forms of their several

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<sup>1</sup> 13 G. 3, c. 63.

<sup>2</sup> If the Att.-Gen. move for the rule, his statement that it will be necessary  
 is sufficient without any affidavit, *R. v. Douglas*, 2 Dowl. N. S. 416.

<sup>3</sup> *R. v. Douglas*, 13 Q. B. 42.

<sup>4</sup> The Act mentions the Supreme Court at Fort William or Calcutta, and  
 the Mayor's Court at Madras and Bombay, but High Courts of Judicature  
 have now been established at Fort William or Calcutta, at Madras, and at  
 Bombay, and these courts have all the powers of the former courts, 24 & 25  
 V., c. 104, §§ 10 & 11. See *Wilson v. Wilson*, L. R., 9 P. D. 8, per Ct. of  
 App.

religions; and shall, by some sworn officers of the court, be reduced into writing on parchment,<sup>1</sup> in case any duplicates shall be required on behalf of any of the parties interested, and shall be sent to the Queen's Bench Division closed up, and under the seals of two or more of the judges of the said court, and one or more of the said judges shall deliver the same to the agents of the parties requiring the same; which agents, or, in case of their death, the person into whose hands the same shall come, shall deliver the same to one of the clerks of the Queen's Bench Division, in the public office, and make oath that he received the same from the judges in India, or if the agent be dead, in what manner the same came into his hands; and that the same has not been opened or altered since he received it (which oath the clerk in court is required to administer); "and such depositions, being duly taken and returned according to the true intent and meaning of this Act, shall be allowed and read, and shall be deemed as good and competent evidence, as if such witness had been present, and sworn and examined *viva voce* at any trial for such crimes or misdemeanors" in the Queen's Bench Division; "and all parties concerned shall be entitled to take copies of such depositions at their own costs and charges."

§ 501. § 42 enacts, that, in all *proceedings in Parliament* touch- § 467  
ing any *offences committed in India*, the Lord Chancellor or Speaker of the House of Lords, and also the Speaker of the House of Commons, may issue their warrants to the Governor-General and Council, or to the chief justice and judges of the High Court of Judicature at Fort William, Madras, or Bombay,<sup>2</sup> for the examination of witnesses; and such examination shall be returned to the Lord Chancellor or Speakers respectively, and proceeded upon as if the directions contained in § 40 were again repeated; and the examination, so returned, shall be deemed good evidence, and shall be allowed and read in the respective Houses. § 45 provides, that no depositions taken and returned by virtue of this Act shall be given in evidence, in any capital case, other than such as shall be proceeded against in Parliament.

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<sup>1</sup> *R. v. Douglas*, 13 Q. B. 42.

<sup>2</sup> See ante, § 500, n. 4

§ 502. The same statute enacts in § 44, that, whenever any § 468  
 person shall commence any *action*,<sup>1</sup> for which *cause hath arisen in India*,<sup>2</sup> in any of the courts at Westminster, such courts respectively<sup>3</sup> may, upon motion there to be made,<sup>4</sup> award a writ in the nature of a mandamus or commission to the chief justice and judges of the High Court of Judicature at Fort William, Madras, or Bombay,<sup>5</sup> for the examination of witnesses; and such examination, being duly returned, shall be allowed and read, and be deemed good evidence, at any trial or hearing between the parties in such action, as if the directions prescribed in § 40 were again repeated.

§ 503. The provisions contained in § 40 of this statute were re- § 469  
 enacted in §§ 78 and 28 of the respective Acts of 24 G. 3, c. 25, and 26 G. 3, c. 57, which regulate the trial of British subjects, who, while employed in India under the Crown or the late East India Company, shall have been guilty of extortion or other misdemeanors; and a clause substantially the same, though varying in some of the minute details, has been introduced into the Act of 42 G. 3, c. 85,<sup>6</sup> which authorises the Queen's Bench Division, in England, to try any person employed in the public service abroad, who, in the exercise, or under colour, of such employment, shall have committed any offence. By § 3 of this last-named statute, as also by § 81 of 24 G. 3, c. 25, the Queen's Bench Division, instead of directing the evidence to be taken *viva voce*, is empowered, on motion made by the Attorney General, prosecutor, or defendant, to order that an examination *de bene esse* of witnesses upon *interrogatories*, in any case where the *viva voce* testimony of such witnesses

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<sup>1</sup> The words of the Act are "any action or suit in law or equity."

<sup>2</sup> See *Francisco v. Gilmore*, 1 B. & P. 177.

<sup>3</sup> *Savage v. Binney*, 2 Dowl. 643.

<sup>4</sup> These words render it necessary for the application to be made to the court, the Judge at Chambers having no jurisdiction. *Clarke v. E. India Co.*, 6 Dowl. & L. 278. The motion may be made, though issues in law are pending for argument, *Kelsall v. Marshall*, 1 Com. B., N. S. 266.

<sup>5</sup> See *ante*, § 500, n. 4.

<sup>6</sup> § 2. See, as to mode of proceeding under this sect., *R. v. Jones*, 8 East, 31, where the court held, that to entitle a defendant to have his trial put off till the return of the writ of mandamus, he must state, by affidavit, such special grounds as will lead the judges to believe that the witnesses sought to be examined are really material for the defence.



cannot conveniently be had, should be taken before an examiner appointed by the court; and the depositions so taken shall be read, and deemed sufficient evidence, upon the trial of the indictment or information, or in any subsequent proceedings relating thereto, saving all just exceptions to the same. The Legislature has, also, by the Act of 6 & 7 V., c. 98, § 4, extended the provisions contained in 13 G. 3, c. 63, § 40, to all indictments or informations laid or exhibited in the Queen's Bench Division, for misdemeanors or offences committed against the Acts passed for the suppression of the slave trade, in any places out of the United Kingdom, and within any British colony, settlement, plantation, or territory.

§ 504. By none of these statutes is the party, who seeks to use the depositions, directed to prove that the witnesses, at the time of the trial, are beyond the jurisdiction of the court. Still, upon general principle, some slight evidence of this nature would seem to be requisite; for although the language of the Acts, rendering the depositions evidence, is exceedingly strong, it may well be doubted whether an express enactment would not be necessary, in order to override the long-established rule of law, that when a witness is living within the jurisdiction of the court, and the party who requires his evidence has the power of calling him, his deposition cannot be read. This view of the subject is confirmed by the Rules of the Supreme Court, 1883, which expressly provide,—as will presently be seen,<sup>1</sup>—that depositions taken under them shall, except under special circumstances, be deemed merely secondary proof. § 470

§ 505. The Act of 1 W. 4, c. 22, further enacts, in § 1, that all the powers, authorities, provisions, and matters contained in the Act of 13 G. 4, c. 63, “relating to the examination of witnesses in India, shall be, and the same are, hereby extended to all colonies, islands, plantations, and places under the dominion of His Majesty in foreign parts, and to the judges of the several courts therein, and to all *actions*<sup>2</sup> depending in the High Court of Justice, in what § 471

<sup>1</sup> Post, § 516.

<sup>2</sup> These words do not include an action at the suit of the Crown, *R. v. Wood*, 7 M. & W. 573, per Parke, B.

place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court, to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority hereby given, will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for." The stat. 3 & 4 V., c. 105, contains a similar enactment in § 66, with respect to the High Court of Justice in Ireland.

§ 506. Although the enactments just cited have not been formally repealed, they have, so far at least as relates to *civil proceedings* in the High Court, been to a great extent virtually superseded by the Rules of the Supreme Court, 1883; for in all such proceedings, the law respecting depositions, and commissions to examine witnesses, is now attempted to be codified by Order XXXVII. of those rules<sup>1</sup> It will, therefore, be convenient for the purpose of facilitating reference, to place before the reader in a collective form the several Rules and Forms which relate to that subject, though many of them will be again referred to in other parts of this work. The Code runs thus:—

"Order XXXVII. II. Examination of Witnesses."

"R. 5. The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice,<sup>2</sup> make any order<sup>3</sup> for

<sup>1</sup> As to the law in Ireland, see 3 & 4 V., c. 105, Ir. As to when proof may be taken by commission under the law of Scotland, see 29 & 30 V., c. 112.

<sup>2</sup> *Bidder v. Bridges*, 53 L. J., Ch. 479; L. R. 26 Ch. D. 1, S. C. There held 1st, that Court *may* make an order ex parte, but at peril of applicant; 2d, that the fact of a witness being 70 years old is *prima facie* good ground for ordering his examination de bene esse; but 3d, that this rule will not apply to a large number of witnesses, except under very special circumstances."

No. 35. APP. K.

"ORDER FOR EXAMINATION OF WITNESSES BEFORE TRIAL."

[Heading as in Form 1.]

"Upon hearing                      and upon reading the affidavit of                      filed  
the                      day of                      18                      , and  
It is ordered that                      a witness on behalf of the                      be ex-  
amined *viâ voce* (on oath or affirmation) before the Master [*or* before  
esquire, special examiner], the                      solicitor or agent giving to the  
solicitor or agent                      notice in writing of the time and place  
where the examination is to take place.

And it is further ordered that the examination so taken be filed in the Central Office of the Supreme Court of Judicature, and that an office copy or copies thereof may be read and given in evidence on the trial of this cause,

the examination upon oath before the Court or Judge or any officer of the Court, or *any other person* and *at any place*, of any witness or person,<sup>1</sup> and may empower any party to any such cause or matter to give such deposition in evidence therein *on such terms*,<sup>2</sup> if any, as the Court or a Judge may direct.

6. An order for a commission<sup>3</sup> to examine witnesses shall be in the Form No. 36,<sup>4</sup> in Appendix K., and the writ of commission saving all just exceptions, without any further proof of the absence of the said witness than the affidavit of the solicitor or agent of the as to his belief, and that the costs of this application be

Dated the                      day of                      18                      ."

<sup>1</sup> See also R. 1 of same Order, cited post, § 1395,

<sup>2</sup> See R. 18, post, p. 460.

<sup>3</sup> If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. Rules of Sup. Ct., Oct., 1884, R. 6, which may also be cited as Rules of Sup. Ct., 1883, Ord. XXXVII. R. 6A. The Forms 1 & 2 in the App. to the above New Rules, contain the forms of such order and request."

No. 36. APP. K.

"SHORT ORDER FOR ISSUE OF COMMISSION TO EXAMINE WITNESSES."

[Heading as in Form 1.]

"Upon hearing                      and upon reading the affidavit of                      filed the                      day of                      18                      , and

It is ordered that the                      be at liberty to issue a commission for the examination of witnesses on                      behalf at

And it is further ordered that the trial of this action be stayed until the return of the said commission, the usual long order to be drawn up, and unless agreed upon by the parties within one week, to be settled by the Master [*or as the case may be*], and that the costs of this application be

Dated the                      day of                      18                      ."

No. 37. APP. K.

"LONG ORDER FOR COMMISSION TO EXAMINE WITNESSES."

[Heading as in Form 1.]

"Upon hearing                      and upon reading the affidavit of                      filed the                      day of                      18                      , and

It is ordered as follows :

1. A commission may issue direct to                      of                      and                      of                      commissioners named by and on behalf of the                      and to                      of                      and                      commissioners named by and on behalf of the                      for the examination upon interrogatories and *riid voce* of witnesses on behalf of the said                      and                      respectively at                      aforesaid before the said commissioners, or any two of them, so that one commissioner only on each side be present and act at the examination.

2. Both the said                      and                      shall be at liberty to examine upon interrogatories and *riid voce* upon the subject matter thereof or arising out of the answers thereto such witnesses as may be produced on their behalf, with liberty to the other party to cross-examine the said witnesses upon cross interrogatories and *riid voce*, the party producing the witness for examination being at liberty to re-examine him *riid voce*; and all such additional *riid voce* questions, whether on examination, cross-examination, or

re-examination, shall be reduced into writing, and, with the answers thereto, returned with the said commission.

3. Within                      days from the date of this order the solicitors or agents of the said                      and                      shall exchange the interrogatories they propose to administer to their respective witnesses, and shall also within

                    days from the exchange of such interrogatories, exchange copies of the cross-interrogatories intended to be administered to the said witnesses.

4.                      days previously to the sending out of the said commission, the solicitor                      of the said                      shall give to the solicitor of the said                      notice in writing of the mail or other conveyance by which the commission is to be sent out.

5.                      days previously to the examination of any witness on behalf of the said                      or                      respectively, notice in writing signed by any one of the commissioners of the party on whose behalf the witness is to be examined, and stating the time and place of the intended examination, and the names of the witnesses intended to be examined, shall be given to the commissioners of the other party by delivering the notice to them personally, or by leaving it at their usual place of abode or business, and if the commissioners of that party neglect to attend pursuant to the notice, then one of the commissioners of the party on whose behalf the notice is given shall be at liberty to proceed with and take the examination of the witness or witnesses *ex parte*, and adjourn any meeting or meetings, or continue the same, from day to day until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

6. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his deposition, to part with the original thereof, then a copy thereof, or extract therefrom, certified by the commissioners or commissioner present to be a true and correct copy or extracts, shall be annexed to the witnesses' deposition.

7. Each witness to be examined under the commission shall be examined on oath, affirmation, or otherwise in accordance with his religion, by or before the said commissioners or commissioner.

8. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *voir dire* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters, to be nominated by the commissioners or commissioner, and to be previously sworn according to his or their several religions by or before the said commissioners or commissioner truly to interpret the questions to be put to the witness or witnesses, and his and their answers thereto.

9. The depositions to be taken under and by virtue of the said commission shall be subscribed by the witness or witnesses, and by the commissioners or commissioner who shall have taken such depositions.

10. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or *certified copies* thereof or extracts therefrom, shall be sent to the Senior Master of the Supreme Court of Judicature on or before the                      day of                      , or such further or other day as may be ordered, enclosed in a cover under the seal or seals of the said commissioners or commissioner, and *office copies* thereof may be given

shall be in the Form No. 13<sup>1</sup> in Appendix J., with such variations as circumstances may require.

in evidence on the trial of this action by and on behalf of the said  
and \_\_\_\_\_ respectively, saving all just exceptions, without any other  
proof of the absence from this country of the witness or witnesses therein  
named, than an affidavit of the solicitor or agent \_\_\_\_\_ of the said  
or \_\_\_\_\_ respectively, as to his belief of the \_\_\_\_\_

11. The trial of this cause is to be stayed until the return of the said commission.

12. The costs of this order, and of the commission to be issued in pursuance hereof, and of the interrogatories, cross-interrogatories, and depositions to be taken thereunder, together with any such document, copy, or extract as aforesaid, and official copies thereof, and all other costs incidental thereto, shall be

Dated the                      day of                      18                      ."

7. The Court or a Judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the until all the witnesses intended to be examined by virtue of the notice have been examined, without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any witness on his examination, cross-examination, or re-examination producing any book, document, letter, paper, or writing, and refusing for good cause to be stated in his depositions to part with the original thereof, then a copy thereof, or extract therefrom, certified by the Commissioners or Commissioner present and acting, to be a true and correct copy or extract, shall be annexed to the witnesses' deposition.

4. Each witness to be examined under this Commission shall be examined on oath, affirmation, or otherwise in accordance with his religion, by or before the Commissioners or Commissioner present at the examination.

5. If any one or more of the witnesses do not understand the English language (the interrogatories, cross-interrogatories, and *voir dire* questions, if any, being previously translated into the language with which he or they is or are conversant), then the examination shall be taken in English through the medium of an interpreter or interpreters to be nominated by the Commissioners or Commissioner present at the examination, and to be previously sworn according to his or to their several religions by or before the said Commissioners or Commissioner truly to interpret the questions to be put to the witness and his answers thereto.

6. The depositions to be taken under this Commission shall be subscribed by the witness or witnesses, and by the Commissioners or Commissioner who shall have taken the depositions.

7. The interrogatories, cross-interrogatories, and depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom, shall be sent to the Senior Master of the Supreme Court of Judicature on or before the day of enclosed in a cover under the seals or seal of the Commissioners or Commissioner.

8. Before you or any of you, in any manner act in the execution hereof, you shall severally take the oath hereon indorsed, on the Holy Evangelist, or otherwise in such other manner as is sanctioned by the form of your several religions, and is considered by you respectively to be binding on your respective consciences. In the absence of any other Commissioner, a Commissioner may himself take the oath.

And we give you or any one of you authority to administer such oath to the other or others of you.

Witness, &c.

This writ was issued by, &c.

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#### WITNESSES' OATH.

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. So help you God.

#### COMMISSIONER'S OATH.

You [or I] shall, according to the best of your [or my] skill and know-

purpose of *producing any writings* or other documents named in the order which the Court or Judge may think fit to be produced:

ledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the Commission within written. So help you [or me] God.

#### INTERPRETER'S OATH.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which shall be administered to, and all and every the questions which shall be exhibited or put to, all and every witness and witnesses produced before and examined by the Commissioners named in the Commission within written, as far forth as you are directed and employed by the said Commissioners to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

#### CLERK'S OATH.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said Commissioners named in the Commission within written, as far forth as you are directed and employed by the Commissioners to take, write down, transcribe or engross the said questions and depositions. So help you God.

Direction of Interrogatories, &c., when returned by the Commissioners.

THE SENIOR MASTER OF THE SUPREME COURT OF JUDICATURE, ROYAL COURTS OF JUSTICE, LONDON."

#### NO 14. APP. J.

#### "COMMISSION TO EXAMINE WITNESSES."

18 . [here put the letter and number].

"In the High Court of Justice,

Probate Divorce and Admiralty Division.

Between *A.B.* Plaintiff

and

the owners of the

Victoria, by the Grace of God, &c., to [state name and address of examiner or commissioner appointed], greeting: Whereas in an action of commenced in Our said High Court of Justice on behalf of against , [and against intervening], the Judge has ordered a commission to be issued for the examination of witnesses concerning the truth of the matters at issue in the said cause. We therefore hereby authorize you, upon the day of 18 at , in the presence of

Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial.

8. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any document shall be deemed guilty of contempt of Court, and may be dealt with accordingly.

9. Any person required to attend for the purpose of being examined or, of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in Court.

10. Where any witness or person is ordered to be examined before any officer of the Court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

11. The examination shall take place in the presence of the parties, their counsel, solicitors, or agents,<sup>1</sup> and the witnesses shall be subject to cross-examination and re-examination.

12. The depositions taken before an officer of the Court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not

the solicitors in the said action, or in the presence of their or either of their lawfully appointed substitutes, or otherwise notwithstanding the absence of either of them, to swear the witnesses who shall be produced before you for examination in the said cause, and cause them to be examined, and their depositions to be reduced into writing. We further authorize you to adjourn (if necessary) the said examinations from time to time and from place to place, as you may find expedient. And We command you, upon the examinations being completed, to transmit the depositions and the whole proceedings had and done before you, together with this commission, to the Registry of the said Division of our said Court.

Witness, &c.

E.F.,  
Registrar.

Commission to examine

Witnesses. .

Taken out by

..

<sup>1</sup> How if they do not think fit to attend? See R. 12.



ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or *such of them as may think fit to attend*. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

13. If any person duly summoned by *subpœna* to attend for examination shall refuse to attend, or if, having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed at the Central Office, and thereupon the party requiring the attendance of the witness may apply to the Court or a Judge *ex parte* or on notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.

14. If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Central Office to be there filed, and the validity of the objection shall be decided by the Court or a Judge.

15. In any case under the two last preceding Rules, the Court or a Judge shall have power to order the witness to pay any costs occasioned by his refusal or objection.

16. When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Central Office, and there filed.

17. The person taking the examination of a witness under these Rules may, and if need be shall, make a special report to the Court touching such examination and the conduct or absence of any

witness or other person thereon, and the Court or a Judge may direct such proceedings and make such order as upon the report they or he may think just.

18. Except where by this Order otherwise provided, or directed by the Court or a Judge,<sup>1</sup> no deposition shall be given in evidence at the hearing or trial of the cause or matter *without the consent* of the party against whom the same may be offered, *unless* the Court or Judge is satisfied that the deponent is *dead*, or *beyond the jurisdiction* of the Court, or *unable from sickness* or other *infirmity* to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate.

19. Any officer of the Court, or other person directed to take the examination of any witness or person, may administer oaths.

20. Any party in any cause or matter may by subpoena ad testificandum or duces tecum require the attendance of any witness before an officer of the Court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in the like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness, having made an affidavit to be used or which shall be used on any proceeding in the cause or matter, shall be bound on being served with such subpoena to attend before such officer or person for cross-examination.<sup>2</sup>

21. Evidence taken subsequently to the hearing or trial of any cause or matter, shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

22. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial, shall extend and be applicable to evidence taken in any cause or matter at any stage.<sup>3</sup>

23. The practice of the Court with respect to evidence at a trial,

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<sup>1</sup> See R. 5, ante.

<sup>2</sup> A witness is not bound to attend an examiner, unless he has been duly served with a subpoena. *Stuart v. Balkis Co.*, 53 L. J., Ch. 791, per Chitty, J.

<sup>3</sup> It seems that the examiner may order any witness to be examined apart from the others, even though he be the agent or solicitor of one of the parties. *In re West of Canada Oil Lands & Works Co.* 46 L. J., Ch. 683, per Jessel, M. R.

when applied to evidence to be taken before an officer of the Court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case.

24. No affidavit or deposition filed or made *before issue joined* in any cause or matter shall, without special leave of the Court or a Judge, be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the Court or a Judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

25. All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter."

§ 507. It cannot fail to be noticed by any one who reads attentively the Rules just cited, that those numbered 5 and 7 are expressed in terms exceedingly wide: and as the powers conferred by them are capable of being applied in furtherance of oppressive and inquisitorial proceedings, it is incumbent on the judges to exercise extreme caution before making any order of an unusual character under either Rule, unless such order be obviously necessary for the purposes of justice.<sup>1</sup> In a recent case,<sup>2</sup> where a defendant attempted to obtain, under rule 7, an order on a *stranger* to produce for inspection some documents, which were his property, and in which the applicant had no interest, the application was rightly regarded as vexatious, and was promptly refused.

§ 507A. The "officers of the Court" mentioned in rule 5 are barristers of at least three years' standing,<sup>3</sup> appointed by the Lord Chancellor for five years, and removable by him.<sup>4</sup> They are called "Examiners of the Supreme Court;" they *must* take all the examinations ordered in the Chancery Division, unless the Court or a Judge otherwise directs<sup>5</sup>; and they *may* take the examinations in

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<sup>1</sup> Central News Co. v. East. News Tel. Co., 53 L. J., Q. B. 236, per Ct. of App.

<sup>2</sup> Id.

<sup>3</sup> Rules of Sup. Ct., made 4 Feb., 1884, Ord. XXXVII., R. 40.

<sup>4</sup> Id. R. 40.

<sup>5</sup> Id. R. 39.

any cause or matter depending either in the Queen's Bench Division, or in the Probate, Divorce, and Admiralty Division, if the Court or a Judge so directs.<sup>1</sup> The examinations, unless the Court or a Judge entrusts the inquiry to one particular examiner,<sup>2</sup> are distributed by the principal clerk to the registrars of the Chancery Division among the whole body, "according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession."<sup>3</sup> They are to give appointments in writing, specifying the place and time, not more than seven days in advance, "at which, subject to any application of the parties, the examination shall be taken;"<sup>4</sup> they are to regard the convenience of the witnesses, and all the circumstances of the case;<sup>5</sup> and, subject to such adjournments as they shall think reasonable or just, they are to proceed *de die in diem*;<sup>6</sup> they may, with like consent, examine persons not named in the order;<sup>7</sup> and, when the examination is completed, they must under their hands certify on the original depositions the number of hours or days employed, and the fees received.<sup>8</sup>

§ 508. It does not fall within the scope of this work to furnish § 473 minute directions as to the course to be pursued by parties, who seek under these Acts or Rules, either for an order to examine witnesses at home, or for an order for a commission, when the witnesses are abroad; but a few of the more important decisions may briefly be noticed. The court or judge,—for applications of this nature may generally be made to either,<sup>9</sup>—will not, except in a case of urgency, to prevent the defeat of justice,<sup>10</sup> make an order either for the examination of witnesses, or for a commission, *until after issue has been joined*; for before that step has been taken it cannot well be ascertained what witnesses are material, neither is it easy to discover how a false witness can be indicted for

<sup>1</sup> Id. R. 39.<sup>2</sup> Id. R. 49.<sup>3</sup> Id. RR. 41, 42.<sup>4</sup> Id. R. 44.<sup>5</sup> Id. R. 45.<sup>6</sup> Id. R. 45, as amended by Rules of Sup. Ct., Oct., 1884, R. 7.<sup>7</sup> Id. R. 46.<sup>8</sup> Id. R. 47, as amended by Rules of Sup. Ct., Oct., 1884, R. 8.<sup>9</sup> See ante, § 502, n. 4.<sup>10</sup> *Finney v. Beesley*, 17 Q. B. 86; *Stone v. Stone*, 31 L. J., Pr. & Mat. 136; *Fischer v. Hahn*, 13 Com. B., N. S. 659; 32 L. J., C. P. 209, S. C. See *Braun v. Mollett*, 16 Com. B. 514; *Brown v. Brown*, 33 L. J., Pr. & Mat. 203.

perjury.<sup>1</sup> An order, however, may be made prospectively, with reference to a new trial, in case the verdict already obtained should be set aside;<sup>2</sup> and if the witness reside beyond the jurisdiction of the court, the application should be made as soon as possible after issue joined.<sup>3</sup>

§ 500. The *affidavit* in support of the motion should,—except § 474 under special circumstances,<sup>4</sup>—name at least some of the witnesses proposed to be examined, or otherwise describe who they are;<sup>5</sup> though it is certainly unnecessary to state the names of them all,<sup>6</sup> and possibly the court would not require any of them to be specified, in a case where the pleadings clearly showed that the examination of witnesses was necessary.<sup>7</sup> The affidavit should also state that the witnesses are material and necessary,<sup>8</sup> though it need not, in general, add, either that their evidence is admissible, or that the application is made *bona fide*,<sup>9</sup> or that the party moving has a good case on the merits;<sup>10</sup> but if the granting the commission would necessarily occasion great delay, and if the adverse affidavits were to show grounds for assuming that the witness would not be material

<sup>1</sup> *Mondel v. Steele*, 8 M. & W. 300; 9 Dowl. 812, S. C.; *Clutterbuck v. Jones*, 6 Dowl. & L. 251, per Patteson, J.; *Dye v. Bennett*, 1 L. M. & P. 92, n. a; *Shaw v. Shaw*, 31 L. J., Pr. & Mat. 95; 2 Swab. & Trist. 642, S. C.

<sup>2</sup> *Hall v. Rouse*, 4 M. & W. 27, per Parke, B.

<sup>3</sup> *Brydges v. Fisher*, 4 M. & Sc. 458; *Steuart v. Gladstone*, L. R., 7 Ch. D. 394, per Fry, J.; 47 L. J., Ch. 154, S. C.

<sup>4</sup> *Cow v. Kinnersley*, 7 Scott, N. R. 892; 6 M. & Gr. 981; 1 Dowl. & L. 906, S. C., where the defendant, who required the commission, was an executrix, and was ready to bring the amount claimed into court to abide the event.

<sup>5</sup> *Gunter v. McTear*, 1 M. & W. 201; 4 Dowl. 722, S. C. nom. *Gunter v. McKear*; *Beresford v. Easthope*, 8 Dowl. 294; *Dimond v. Vallance*, 7 Dowl. 590. In *Boyce v. Rusboro'*, 2 Ir. Law R., N. S. 266, where a commission was applied for to examine witness in Canada, and the affidavit in support of the motion did not give the names, descriptions, and residences of the witnesses; the court, in directing the commission to issue, made an order that the opposite side should be furnished with these particulars within a reasonable time.

<sup>6</sup> *Nadin v. Bassett*, L. R., 25 Ch. D. 21, per Ct. of App.; 53 L. J., Ch. 253, S. C.

<sup>7</sup> *Carbonell v. Bessell*, 5 Sim. 636; *Rougemont v. Royal Ex. Ass. Co.*, 7 Ves. 304; *M'Hardy v. Hitchcock*, 11 Beav. 93.

<sup>8</sup> *Norton v. Melbourne*, 3 Bing. N. C. 67; 3 Scott, 398; 5 Dowl. 181, S. C.; *Dye v. Bennett*, 1 L. M. & P. 92; *Armour v. Walker*, L. R. 25 Ch. D. 673.

<sup>9</sup> *Langen v. Tate*, L. R., 24 Ch. D. 522; 53 L. J., Ch. 361, S. C.

<sup>10</sup> *Baddeley v. Gilmore*, 1 M. & W. 55; *Tyr. & Gr.* 369, S. C.; *Westmoreland v. Huggins*, 1 Dowl. N. S. 800.

or necessary,<sup>1</sup> or if, for any other special reason, the court should be of opinion that the granting of the application would tend to defeat the ends of justice,<sup>2</sup> then, in the exercise of its discretion, it would probably not be satisfied, unless the affidavit in support of the motion should point out, not only in what manner the evidence would be material, but also that it would be admissible;<sup>3</sup> and if there were reason to believe that the application was made by the defendant for a sinister motive, it would either be refused, or, at least, the applicant would be ordered to bring the money in dispute into court.<sup>4</sup> In one case, where the defendant moved for a commission to examine witnesses in New Zealand, the court refused to interfere, unless an affidavit could be produced from his *solicitor*, showing that the evidence to be given by the persons proposed to be examined was material and *necessary* to the defence of the action.<sup>5</sup> The affidavit must further disclose, either that the witness is out of the jurisdiction of the court,<sup>6</sup> or that he will be so at the time of the trial, being about to leave the country;<sup>7</sup> or that he is in such a precarious state of health as to render it highly probable that he will be unable to attend the trial.<sup>8</sup>

§ 510. Although the judges are empowered by these Rules § 475 to grant commissions to examine parties to the record who are resident abroad,<sup>9</sup>—for such persons are now, by virtue of Lord

<sup>1</sup> *Dye v. Bennett*, 1 L. M. & P. 92; *Langen v. Tate*, L. R. 24 Ch. D. 522; 53 L. J., Ch. 361, S. C.

<sup>2</sup> *In re Boyce*, *Crofton v. Crofton*, L. R., 20 Ch. D. 670; 51 L. J., Ch. 660, S. C.; *In re The Imper. Land Co. of Marseilles*, 37 L. T., N. S. 589; *Berdan v. Greenwood*, L. R., 20 Ch. D. 764, n.; as explained by *Cotton*, L. J., in *Armour v. Walker*, L. R., 25 Ch. D. 676. *Lawson v. Vacuum Brake Co.*, L. R., 27 Ch. D. 137, per Ct. of App.

<sup>3</sup> *Lloyd v. Key*, 3 Dowl. 253, per *Parke*, B.; *Lane v. Bagshaw*, 16 Com. B. 576.

<sup>4</sup> *Sparkes v. Barrett*, 5 Scott, 402.

<sup>5</sup> *Healey v. Young*, 2 Com. B. 702; *Barry v. Barclay*, 15 Com. B., N. S. 849.

<sup>6</sup> *Norton v. Melbourne*, 3 Bing. N. C. 67; 3 Scott, 398; 5 Dowl. 181, S. C.

<sup>7</sup> *Pirie v. Iron*, 8 Bing. 143; 1 M. & Sc. 223; 1 Dowl. 252, S. C.

<sup>8</sup> *Abraham v. Newton*, 8 Bing. 274; 1 Dowl. 266; 1 M. & Sc. 384, S. C., nom. *Abraham v. Norton*; *Pond v. Dimes*, 3 M. & Sc. 161; 2 Dowl. 730, S. C.; *Davis v. Lowndes*, 6 Scott, 738; 7 Dowl. 101, S. C. In this last case the affidavit of a medical man was required.

<sup>9</sup> *Nadin v. Bassett*, 53 L. J., Ch. 253, per Ct. of App.; L. R., 25 Ch. D. 21, S. C.; *Codd v. Donnelly*, 9 Ir. Law R., N. S. 465; *Walker v. Bennett*, I. R. 5 C. L. 366. In this last case the court, on the application of a plaintiff residing in America, issued a commission to examine him on his own behalf.

Brougham's Act,<sup>1</sup> competent witnesses,—it is clear, that motions for this purpose ought not to be lightly entertained, especially when made on behalf of the party who is sought to be examined. In a case,<sup>2</sup> where this question was under discussion in the Queen's Bench, that court very properly determined that the application could not be granted, unless it were supported by affidavits clearly showing that the commission would, under the circumstances, be conducive to the due administration of justice; and Lord Campbell dryly remarked, that a less stringent rule would inevitably lead to the pernicious practice of parties going abroad to avoid the risk of cross-examination in open court. In another case where the plaintiff resided in New Zealand, and the question to be decided turned on his personal identity, the court, —while appointing at his instance examiners to take his evidence in New Zealand,—gave special directions that, as his presence in England was not shown to be practically impossible, his deposition, though taken, should not be read at the trial without consent, unless he was present in court ready to be cross-examined *viva voce*.<sup>3</sup>

§ 511. In the Form<sup>4</sup> given by the New Rules for a commission § 476 to examine witnesses, a clause is introduced requiring the commissioners to be sworn. It may be doubtful, however, whether this clause would in all cases be deemed essential, for on several occasions, under the old law, such a clause has been omitted, where, in order to enforce the attendance of witnesses, the commission has been directed either to the judges of a foreign court,<sup>5</sup> or to the foreign court itself.<sup>6</sup> From these cases, as well as from others,<sup>7</sup> it is now perfectly clear that commissions may be granted to examine witnesses, while resident in countries beyond the dominion of the British Crown.

<sup>1</sup> 14 & 15 V., c. 99.

<sup>2</sup> *Castelli v. Groom*, 18 Q. B. 490. See *Braun v. Mollett*, 16 Com. B. 514; *Fischer v. Hahn*, 13 Com. B., N. S. 659; 32 L. J., C. P. 209, S. C.

<sup>3</sup> *Nadin v. Bassett*, L. R., 25 Ch. D. 21, per Ct. of App.; 53 L. J., Ch. 253, S. C. See *Armour v. Walker*, L. R., 25 Ch. D. 673; 53 L. J., Ch. 413, S. C., per Ct. of App. <sup>4</sup> See F. 13, par. 8, App. J., cited ante, p. 455, n. 1.

<sup>5</sup> *Clay v. Stephenson*, 3 A. & E. 807; 5 N. & M. 318, S. C., *Ponsford v. O'Connor*, 5 M. & W. 673; 7 Dowl. 866, S. C.; *Lumley v. Gye*, 3 E. & B. 114. See, also, *Boelen v. Melladew*, 10 Com. B. 898.

<sup>6</sup> *Fischer v. Sztaray*, 27 L. J., Q. B. 239; S. C. nom. *Fischer v. Izataray*, E. B. & E. 321.

<sup>7</sup> *Duckett v. Williams*, 1 C. & J. 510; 1 Dowl. 291, S. C.

§ 512. In order to render the depositions taken under a commission available, the evidence must be such, in substance, as would be received according to the English law; and if at the trial it should appear, either on the face of the depositions, or by extrinsic proof, that the commissioners have, after due objection taken,<sup>1</sup> admitted illegal, or rejected legal, evidence, the judge will, it seems, be empowered, in the exercise of his discretion, to suppress the depositions either wholly or in part.<sup>2</sup> § 476

§ 513. The commissioners must substantially follow the instructions which they have received by the instrument appointing them, though the court will not look out critically for objections to their conduct, but will rather in their favour presume that they have discharged their duty.<sup>3</sup> Thus, where a commission, directed to the judges of a foreign court, required that after the examinations had been taken, *the same* should be transmitted to this country, it was held insufficient to send mere copies of them;<sup>4</sup> but where commissioners for the examination of witnesses abroad were directed to reduce the examinations into writing in the English language, and to swear an interpreter to translate the oath, interrogatories, and depositions, the court held that the commission was well executed by the return of depositions, which had originally been taken down in the foreign language, and six weeks afterwards had been translated by the interpreter into English.<sup>5</sup> So, when the commission contained a direction that the witnesses should be examined apart from each other, the court presumed that the commissioners had complied with this order, although their return was silent on the subject.<sup>6</sup> Possibly however, the court would not feel justified in presuming that com- § 477

<sup>1</sup> Robinson v. Davies, L. R., 5 Q. B. D. 26; 49 L. J., Q. B. 218, S. C.

<sup>2</sup> Lumley v. Gye, 3 E. & B. 114.

<sup>3</sup> Atkins v. Palmer, 4 B. & A. 380, per Abbott, C. J.; Greville v. Stulz, 11 Q. B. 1004, per Ld. Denman; Hitchins v. Hitchins, 35 L. J., Pr. & Mat. 69; 1 Law Rep., P. & D. 153, S. C.; Grill v. Gen. Iron Screw Collier Co., 1 Law Rep. C. P. 600; 35 L. J., C. P. 321; 1 H. & R. 654, S. C.; Hodges v. Cobb, 36 L. J., Q. B. 265; 2 Law Rep., Q. B. 652; 8 B. & S. 583, S. C.

<sup>4</sup> Clay v. Stephenson, 7 A. & E. 185; 2 N. & P. 189, S. C.

<sup>5</sup> Atkins v. Palmer, 4 B. & A. 377; R. v. Douglas, 13 Q. B. 42.

<sup>6</sup> Simms v. Henderson, 11 Q. B. 1015.



missioners had taken the oaths prescribed to them before acting.<sup>1</sup> When documents have been produced in evidence before the commissioners, it will now suffice to transmit with the depositions either the originals or certified copies or extracts;<sup>2</sup> and attention is drawn to this rule, because a more stringent one used to prevail.<sup>3</sup>

§ 514. When a commission to take evidence is directed to a court, it is of course desirable that the court should be rightly named. A slight error in the description, however, will not invalidate the commission, provided it be not of such a nature as to render it really doubtful what tribunal was intended to have been addressed.<sup>4</sup>

§ 516. It will be seen that, under the above Rules,<sup>5</sup> depositions § 479 are as a general rule rendered admissible only in one or other of four events. First, if the opposite party *consents*; secondly, if the witness be proved to be *dead*; thirdly, if he be shown to be *beyond the jurisdiction* of the court;<sup>6</sup> and, lastly, if it appear that, from *sickness* or *infirmity*,—which terms do not necessarily mean an *incurable* malady, but will be satisfied by any grave illness,<sup>7</sup>—he cannot attend the trial. It is true that, by virtue of Rule 5,<sup>8</sup> none of these conditions are now absolutely binding, for the judge is thereby clothed with power to order depositions to be given in evidence in any case, quite irrespective of the conditions and in spite of them all. Still, that power must be guided by a judicial discretion, and the judge would be more bold than wise, who should set at nought those safeguards which have hitherto been deemed essential to the

<sup>1</sup> *Brydges v. Branfill*, 12 Sim. 334.

<sup>2</sup> See F. 13, par. 3 & 7, App. J., cited ante, p. 456.

<sup>3</sup> *R. v. Douglas*, 1 C. & Kir. 670.

<sup>4</sup> *Wilson v. Wilson*, L. R., 9 P. D. 8.

<sup>5</sup> R. 18, cited, ante, § 506.

<sup>6</sup> By the Scotch law, when a witness *residing* abroad is examined under a commission, his deposition may be read without proving at the trial that he is then absent; and the onus of showing that he is within the jurisdiction rests on the objecting party. *Sutton v. Ainslie*, 1 Macq. Sc. Cas. H. of L. 299. The same doctrine has been recognised by Sir C. Cresswell in the Matrimonial Court. *Pollack v. Pollack*, and *Mills v. Mills*, 30 L. J., Pr. & Mat. 183; 2 Swab. & Trist. 310, S. C.

<sup>7</sup> *D. of Beaufort v. Crawshay*, 35 L. J., C. P. 342; 1 Law Rep., C. P. 699; and 1 H. & R. 638, S. C.

<sup>8</sup> Cited ante, § 506.

due administration of justice.<sup>1</sup> It is probable, therefore, that in practice, the admissibility in evidence of depositions will still, in the absence of *consent*,—as formerly,—depend on the capability of the witness' attendance at the trial;<sup>2</sup> and this view of the law is considerably strengthened by a proviso contained in Rule 1, of the same Order, which limits the admissibility of affidavits, by declaring that "where it appears to the court or judge that the other party *bona fide* desires the production of a witness for cross-examination, and *that such witness can be produced*, an order shall *not* be made authorising the evidence of such witness to be given by affidavit."<sup>3</sup>

§ 517. Assuming, then, the law to be as stated above, the ques- § 479  
tion remains, How is the incapacity of the witness to attend the trial to be proved? As the evidence on that point is exclusively addressed to the judge, a doubt has been raised as to whether *affidavits* will not be admissible in lieu of the ordinary *viva voce* testimony; and on one occasion Chief Baron Pollock received the affidavit of a *medical man*, as sufficient proof of the sickness of a deponent to let in his deposition.<sup>4</sup> This course, however, though highly convenient, is of questionable legality,<sup>5</sup> and the doubt on the subject has not been cleared up by the New Rules. In the Rules themselves no reference is made to the matter, and the only two Forms, which allude to it, do so in language inconsistent and obscure. In the Order<sup>6</sup> for a commission to examine witnesses, a clause is inserted, that the depositions may be given in evidence, "without any other proof of the *absence from this country* of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the

<sup>1</sup> See *Warner v. Mosses*, 50 L. J., Ch. 29, per Jessel, M. R., in Ct. of App.; L. R., 16 Ch. D. 102, S. C.; *Bidder v. Bridges*, L. R., 26 Ch. D. 1, 15; 53 L. J., Ch. 479, 486, S. C.

<sup>2</sup> See *Bagot v. Bagot*, 1 L. R. Ir., 1.

<sup>3</sup> See *Nadin v. Bassett*, L. R., 25 Ch. D. 21, per Ct. of App.

<sup>4</sup> *Knight v. Campbell*, Guildford Summer Ass. 1848, MS.

<sup>5</sup> The point was again raised and left undecided in the case of the D. of Beaufort v. Chawshay, 35 L. J., C. P. 342; 1 Law Rep., C. P. 699; and 1 H. & R. 638, S. C. There, Willes, J., who seemed inclined to support the ruling of the chief Baron, referred to *R. v. Ryle*, 9 M. & W. 227; but that case, on careful examination, will be found to throw a most treacherous light on the subject, relating, as it does, to a mere *ex-parte* proceeding. See, also, *Carruthers v. Graham, C. & Marsh*, 5, per Ld. Denman; *Robinson v. Markia*, 2 M. & Rob. 375, per Ld. Abinger; and ante, §§ 473, 475.

<sup>6</sup> F. 37, par. 10, App. K., cited ante, p. 455.

said                    as to his belief of the                    .” This so far as it goes is clear, but it deals simply with the case of the witness being out of the jurisdiction of the Court. Under the Order,<sup>1</sup> however, for examining witnesses before the examiner, the depositions of any witness may be given in evidence on the trial of the cause, “without any further proof of the *absence* of the said witness than the affidavit of the solicitor or agent of the                    as to his belief.” Here it will be seen that the term “absence” has a more indefinite signification than in the former Order, and it is not unlikely that the Judges may interpret it, as including an absence from the court in consequence of death or illness, as well as an absence from the country. However this may be, the question whether an affidavit, made by a person who is neither a solicitor or agent in the cause, is or is not admissible to let in secondary evidence of depositions, remains to be decided in accordance with the principles of the common law; and the point raised in the early part of this section is still left in doubt.

§ 518. All the provisions of the Acts of 13 G. 3, c. 63, 1 W. 4, § 480 c. 22,<sup>2</sup> and 3 & 4 V., c. 105, Ir., which relate to the examination of witnesses under the commissions and orders of what is now the High Court, have been extended to all suits and proceedings on the Revenue side of the Queen’s Bench Division.<sup>3</sup> They have also been made applicable to the Probate and Divorce Division, in England,<sup>4</sup> and to the corresponding Courts in Ireland. Each of the statutes creating these courts contains an enactment, which provides, that,<sup>5</sup> “where a witness is out of the jurisdiction of the court, or where by reason of his illness or from other circumstances, the court shall not think to enforce the attendance of the witness in open court, it shall be lawful for the court to order a commission to issue for

<sup>1</sup> F. 35, App. K., cited ante, p. 453.

<sup>2</sup> Many of the sections of this Act are repealed by 46 & 47 V., c. 49, but the repeal does not affect the incorporations here referred to. See § 5 of Act, subs. (e)

<sup>3</sup> 22 & 23 V., c. 21, § 16. See, as to the former law, Att.-Gen. v. Bovet, 15 M. & W. 60.

<sup>4</sup> See Rules in Div. & Mat. Causes, rr. 132—137, 198. Also, F. 14, App. J., cited, ante, p. 457.

<sup>5</sup> 20 & 21 V., c. 77, § 32; 20 & 21 V., c. 79, § 37, Ir.; and 20 & 21 V., c. 85, § 47. See also 33 & 34 V., c. 110, § 24, Ir.

the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the court, to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said court, or other person to be named in such order for the purpose."<sup>1</sup> The section then proceeds to clothe the court with all the powers vested in the Courts and Judges by the Acts just cited.<sup>2</sup>

§ 519. The legislation on this subject, so far as it relates to the Courts of Bankruptcy in England, is somewhat bald; for the only enactments in reference to the matter are contained either in § 27, subs. 0, or in § 105, subs. 5, of the Act of 1883.<sup>3</sup> The first section just named simply empowers the court, if it think fit, to "order, that any person, who in England would be liable to be brought before it" with the view of discovering the debtor's property, "shall be examined in Scotland or Ireland, or in any other place out of England." The other section enacts, in language provokingly vague, that, "subject to general rules, the court may in any matter take the whole or any part of the evidence either *viva voce*, or by interrogatories, or upon affidavit, or by *commission abroad*." The only Bankrupt Rules bearing on the subject are r. 58, under which the court may empower any party to any matter, "where it shall appear necessary for the purpose of justice," to give depositions in evidence on such terms as the court may direct; and r. 60, which provides, that "an order for a commission to examine witnesses, and the writ of commission shall follow the Forms<sup>4</sup> for the time being in use in the High Court, with such variations as circumstances may require."

§ 520. The County Court rules on the same subject are not much more satisfactory than those which are recognised in the Bankruptcy Court. They will be found in Order XIV. of the Rules of

<sup>1</sup> See *Brown v. Brown*, 38 L. J., Pr. & Mat. 78; 1 Law Rep., P. & D. 720, S. C.

<sup>2</sup> See, also, the rules of March, 1874, for the Ct. of Prob. in Eng., rr. 116—123, and Form 31. Also, the rules of 1865 for the Ct. of Div. & Mat. Causes, rr. 129—137, Form 20.

<sup>3</sup> 46 & 47 V., c. 52.

<sup>4</sup> See ante, pp. 453, 455.

1875. Rule 7 of that Order provides, that "in executing any order made under these rules,<sup>1</sup> or under section 53, of 'The Common Law Procedure Act, 1854,' the registrar, or his clerk in his presence, shall transcribe the answers given by the witnesses examined before him, and the registrar shall read over the answers so transcribed, and the witness shall sign his name at the foot thereof, and the registrar shall thereupon file the same as the deposition of such witness." Rule 8 then provides, that "upon the application of a party desirous to examine a witness residing out of the jurisdiction of the court, the judge may, if he thinks fit, appoint the registrar of the court within the district of which such witness resides to take the examination of such witness, who shall take the same in the manner provided by the last preceding rule, and transmit it by post to the registrar of the court in which the action is pending." Rule 9 further provides, that "when it shall be necessary to examine a witness *de bene esse*, application upon affidavit shall be made to the judge or registrar to appoint an *examiner* for that purpose;" but this rule—standing alone as it does—would seem to be mere waste paper. Rule 10 is also sufficiently funny, for it explains to the suitor that "affidavits and depositions shall be read as the evidence of the person *by whom they are used*." It would indeed be odd if this were not the case.

§ 521. Between the years 1854 and 1875 many Rules were framed either by the Legislature or the judges, with the view of enabling litigants, before the actual trial took place, to scrape the consciences of their opponents by means of interrogatories.<sup>2</sup> It is unnecessary here to describe the machinery by which that object was sought to be attained, since the law on the subject is now embodied in Order XXXI. of the Rules of the Supreme Court, 1883.

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<sup>1</sup> The only rule applicable would seem to be rule 8, cited *infra*.

<sup>2</sup> 17 & 18 V., c. 125.

<sup>3</sup> 17 & 18 V., c. 125, §§ 51—57; 38 & 39 V., c. 77, Ord. xxxi. For corresponding provisions relative to England, see 19 & 20 V., c. 102, §§ 56—62; 40 & 41 V., c. 77, Ir. & Rules. Similar powers were also extended to the old Court of Admiralty, whether for England, see 24 & 25 V., c. 10, § 17, repealed by 44 & 45 V., c. 59; or for Ireland, see 30 & 31 V., c. 114, § 41, Ir.

§ 522. Rule 1 of that Order provides that, "in any action where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, the plaintiff may at any time after delivering his statement of claim,<sup>1</sup> and a defendant may at or after the time of delivering his defence, *without any order* for that purpose, and in every other cause or matter the plaintiff or defendant may *by leave* of the court or a judge, deliver interrogatories<sup>2</sup> in writing for the examination of the opposite parties, or any one or more of such parties; and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories, which do not relate to any matters in question in the cause or matter,<sup>3</sup> shall be deemed *irrelevant*, notwithstanding that they might be admissible on the oral cross-examination of a witness."

§ 522A. Although, under the first clause of the above rule, the plaintiff, in cases where relief is sought "on the ground of fraud or breach of trust," would seem to be entitled to deliver interrogatories

<sup>1</sup> Harbord v. Monk. L. R., 9 Ch. D. 616, per Jessel, M. R. But see Mercier v. Cotton, L. R., 1 Q. B. D. 442.

<sup>2</sup> The Form, as given in the rules, is scarcely as valuable as might have been expected, and the more so as a special rule has been deemed necessary declaring that interrogatories may be in that form, "with such variations as circumstances may require." See R. 4, and Form 6, Appendix B., which is as follows:—

"In the High Court of Justice,  
Division.

18 [*Here put the letter and number.*]

Between A. B., plaintiff,  
and

C. D., E. F., & G. H., defendants.

Interrogatories on behalf of the above-named [*plaintiff*, or *defendant*, C. D.] for the examination of the above-named [*defendants*, E. F. & G. H., or *plaintiff*.]

1. Did not, &c.

2. Has not, &c.

[*The defendant E. F. is required to answer the interrogatories numbered .*]

[*The defendant G. H. is required to answer the interrogatories numbered .*]

<sup>3</sup> As, for instance, questions which go merely to the credit of the party, or which do not otherwise tend to prove or disprove any material matter in litigation. Allhusen v. Labouchere, L. R., 3 Q. B. D. 654, per Ct. of App.; 47 L. J., Q. B. 819, S. C.

"at any time after delivering his statement of claim," it is still doubtful whether he can in fact take that step before the delivery of the defence, without incurring serious risk; for the defendant, as will be seen presently,<sup>1</sup> may object to answering on the ground that the matters inquired into were not material until the nature of the defence was made known, and the judges, in such a case, would probably uphold the objection, and the plaintiff would be mulct in costs.<sup>2</sup>

§ 523. The power conferred on the judges of granting leave for the delivery of interrogatories is not limited by the Rule to any stage of the proceedings, and may consequently, as it would seem, be, in strict law, exercised at any time; but still it is likely that, in actual practice,—except under special circumstances amounting almost to a case of urgent necessity,<sup>3</sup>—leave will not be granted to a plaintiff *before* he has put in his statement of claim, or to a defendant *before* he has put in his defence.<sup>4</sup> Be that as it may, Rule 2 specially directs, that, "in deciding upon any application for leave to exhibit interrogatories, the court or a judge shall take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matters in question or any of them."

§ 524. In using the term "opposite parties" to denote the persons who may be required under the above rule to answer interrogatories, vague language has been employed which portends future litigation. One difficulty, however, has been anticipated and partially cleared up by the judges; for R. 5 of the same Order

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<sup>1</sup> Post, § 527A.

<sup>2</sup> *Mercier v. Cotton*, L. R., 1 Q. B. D. 442, per Ct. of App.; 46 L. J., Q. B. 184, S. C.

<sup>3</sup> See *Acheson v. Henry*, I. R., 5 C. L. 496; *Gourley v. Plimsoll*, 42 L. J., C. P. 244; 8 Law Rep., C. P. 362, S. C.

<sup>4</sup> *Disney v. Longbourne*, 45 L. J., Ch. 532, per Jessel, M. R.; I. R., 2 Ch. D. 704, S. C. See *Martin v. Hemming*, 10 Ex. R. 378; *Forshaw v. Lewis*, id. 716; *Crookes v. Morrison*, 5 E. & B. 984; *Morris v. Parr*, 6 B. & S. 203. See, however, *Harbord v. Monk*, L. R., 9 Ch. D. 616, per Jessel, M. R., as to the practice in the Chancery Division.

provides, that, "if any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any *member or officer*<sup>1</sup> of such corporation, company, or body, and an order may be made accordingly."

§ 524A. In acting under this last rule the judge should be satisfied that the member or officer sought to be interrogated is likely to be able to give discovery; but he is not bound at that stage of the proceedings to consider the propriety of the proposed interrogations.<sup>2</sup> When interrogatories have been delivered to a member under this rule he cannot refuse to file his affidavit in answer until he has been paid his taxed costs.<sup>3</sup> Neither can a town clerk, who has been put forward as a public officer to answer interrogatories on behalf of a municipal corporation, claim exemption from answering on the ground of privilege as being also the solicitor to the corporation.<sup>4</sup> The establishment of the above rule has been productive of much good, for it has put a stop to the costly and vexatious practice which used to prevail in equity suits of making individual members and officers of corporate bodies nominal defendants for the mere purpose of discovery.<sup>5</sup> Now, if such a course were taken, the judge would strike out the name of the formal defendant, and grant him his full costs.<sup>6</sup>

§ 524B. It must also be borne in mind, that the above rule only enables parties to interrogate *opposite* parties, and consequently one defendant cannot avail himself of it for the purpose of interrogating another co-defendant.<sup>7</sup>

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<sup>1</sup> See *Rep. of Costa Rica v. Erlanger*, L. R., 1 Ch. D. 171, per Ct. of App.

<sup>2</sup> *Berkeley v. Standard Discount Co.*, L. R., 9 Ch. D. 643, per Malins, V.-C.

<sup>3</sup> *Berkeley v. Standard Discount Co.*, L. R., 13 Ch. D. 97, per Ct. of App.; 49 L. J., Ch. 1, S. C.; overruling S. C., L. R., 12 Ch. D. 295, per Fry, J.; and 48 L. J., Ch. 797.

<sup>4</sup> *Swansea, May. of, v. Quick*, 49 L. J., C. P. 157; L. R., 5 C. P. D. 106, S. C. nom. *Swansea, May. of, v. Quirk*.

<sup>5</sup> *Wilson v. Church*, L. R., 9 Ch. D. 552, per Jessel, M. R.

<sup>6</sup> *Id.*

<sup>7</sup> *Molloy v. Kilby*, L. R., 15 Ch. D. 162, per Ct. of App.



§ 524c. It is almost needless to add that a guardian ad litem to a lunatic defendant is not a "party" within the meaning of the rule, and therefore cannot be compelled to answer interrogatories.<sup>1</sup>

§ 525. As the liberty granted by the first clause in Rule 1 was likely to degenerate into licence, and instead of aiding the investigation of truth, to heap up what lawyers love to call with selfish tautology "costs, charges, and expenses," a remedy for this anticipated abuse has been devised by Rule 3, which is thus expressed:—"In adjusting the costs of the cause or matter, inquiry shall, at the instance of any party, be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault."

§ 526. Whether these provisions will prove effective or not remains to be seen, but he must be a sanguine reformer who can await the result of the experiment without some apprehension. The question "quis custodiet custodes?" forces itself upon the memory, and the discretion of a taxing officer,—subject though it may be to the costly control of a judge,—will scarcely afford a very safe protection to the suitor against the danger of interrogatories being exhibited "unreasonably, vexatiously, or at improper length."

§ 527. Three more attempts to keep within due bounds the powers entrusted to suitors by Rule 1 have been embodied in other rules of the same Order. First, it is provided by Rule 25, that "in every cause or matter the costs of discovery, by interrogatories or otherwise, shall, *unless otherwise ordered*<sup>2</sup> by the court or a judge, be secured in the first instance as provided by Rule 26"; and then, under that Rule, every party seeking discovery must, before taking

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<sup>1</sup> *Ingram v. Little*, L. R., 11 Q. B. D. 251. See, also, Ord. XVIII, and post, § 1800.

<sup>2</sup> See *A. Intre Smith*; *Smith v. Went*, 50 L. T. Rep., N. S. 382; *Burr v. Hubbard*, 76 L. T. 77; *W. N.* 1883 p. 198; and *Henderson v. Ripley*, 76 L. T., 388; *W. N.* 1884, p. 85, as to when the court will relax the Rule.

any step, pay into court to a separate account in the action a sum of at least 5*l.*, and this sum will only be allowed as part of his costs where the discovery appears to the judge, or the court, or the taxing officer, to have been reasonably asked for. The discretionary power entrusted to the judge of dispensing with this preliminary payment, should, in the interests of the poorer suitors, be cautiously exercised; and the mere fact of the solicitors on both sides consenting to waive the deposit, so far from depriving the judge of his right to withhold such an order if he thinks fit, would, in most cases, be an additional reason why he should determine to form his own independent judgment on the matter.<sup>1</sup>

§ 527*A*. The next attempt made to remedy what may justly be called the abuse of discovery will be found in Rule 6, which provides, that "any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer." Rule 7 lastly provides, that "any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous; and any application for this purpose may be made within *seven* days after service of the interrogatories."<sup>2</sup>

§ 528. The party who applies to the court to strike out interrogatories under these last rules must—unless he can show that the *whole* of them are either scandalous or irrelevant, or not put *bonâ fide*—specify the particular questions to which he objects, and the grounds of his objection.<sup>3</sup> Next, before the court will interfere, it must be satisfied not only that the objection is a reasonable one, but that it applies to the interrogatory itself, and rests on some

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<sup>1</sup> *Aste v. Stumore*, 53 L. J., Q. B. 82, per Ct. of App.; L. R., 13 Q. B. D. 326, S. C.

<sup>2</sup> See *Gay v. Labouchere*, L. R., 4 Q. B. D. 206; 48 L. J., Q. B. 279, S. C.

<sup>3</sup> *Allhusen v. Labouchere*, L. R., 3 Q. B. D. 654, per Ct. of App.; 47 L. J., Q. B. 819, S. C.

ground of a similar nature to those enumerated in the rule.<sup>1</sup> A relevant interrogatory, therefore, cannot be struck out by a judge on the ground that the matter inquired after relates to an indictable offence, but the remedy of the party interrogated in such a case is to decline to answer, on the ground that such answer may tend to criminate him.<sup>2</sup> Neither can the rules be relied on for the purpose of excluding interrogatories on the ground that they seek discovery of the facts on which the opposite party relies, though all questions will be struck out which are put with the view of discovering the evidence by which such facts are intended to be established.<sup>3</sup> 'When the facts relied on consist of conversations, the party interrogated may be required to give their general effect, but not to set out their details.'<sup>4</sup>

§ 528A. When a judge has exercised his discretion under these rules, the Lords Justices will not readily entertain any appeal, unless it be clear that the decision rests on a *wrong principle* in which event they are bound to interfere so that the right doctrine may in future be understood.<sup>5</sup> It may not at all times be an easy task for a judge to determine in what manner to deal with interrogatories, when some of them are objectionable and others are free from objection. This much, however, may perhaps be safely laid down, that, in such a case, the objectionable questions should alone be struck out, unless they be so intermingled with the others as to render it difficult to separate them, or unless they form a large majority of the interrogatories delivered. In either of these cases the judge may, as it seems, properly exercise his discretion by striking out the whole batch, and leaving the party to deliver new ones.<sup>6</sup> Although any party improperly interrogated is empowered,

<sup>1</sup> *Fisher v. Owen*, L. R., 8 Ch. D. 645, per Ct. of App.; 47 L. J., Ch. 681. S. C.; *Eade v. Jacob*, 47 L. J., Ex. 74, 76, per Ct. of App.; L. R., 3 Ex. D. 335, 337, S. C.; *The Radnorshire*, L. R., 5 P. D. 172.

<sup>2</sup> *Fisher v. Owen*, L. R., 8 Ch. D. 645, per Ct. of App.; 47 L. J., Ch. 681, S. C.

<sup>3</sup> *Eade v. Jacob*, 47 L. J., Ex. 74, per Ct. of App.; L. R. 3 Ex. D. 335, S. C. See *Johns v. James*, L. R., 13 Ch. D. 370; and *Att.-Gen. v. Gaskill*, L. R., 20 Ch. D. 519; 51 L. J., Ch. 870, S. C.

<sup>4</sup> *Id.*

<sup>5</sup> *Fisher v. Owen*, L. R., 8 Ch. D. 645, 652, 653, per Ct. of App. See *Thorburn v. Crawford*, per Ct. of App., 26 July, 1884.

<sup>6</sup> *Id.* 652, per Jessel, M. R.

under Rule 6, to apply to a judge to strike out the obnoxious questions, he is not bound to take that course; and if he neglects to do so, he may still refuse to answer any question when a legal ground for such refusal exists.<sup>1</sup> The recent case of *Lyell v. Kennedy*,<sup>2</sup> decided in the House of Lords, will serve to illustrate this proposition. There, the plaintiff having been interrogated respecting his knowledge, information, and belief upon matters relevant to the defendant's case, answered that he had no personal knowledge of any of the matters, and that the only information he had received with regard to them had been derived from privileged communications made to him by his solicitors or their agents for the purposes of his own case; and he then submitted that he was not bound to state his belief on the subject, derived as it was from such communications, or to make any further answer. The court under these circumstances held that the answer was sufficient.

§ 529. Order XXXI,—after further providing that all interrogatories “shall be answered by affidavit, to be filed within ten days or such other time as a judge may allow,”<sup>3</sup> and that such affidavit may be in accordance with the Form given,<sup>4</sup> and shall, if exceeding ten folios, be printed, unless otherwise ordered by a judge,<sup>5</sup>—goes on to declare, in Rule 10, that “no exceptions shall be taken to any affidavit in answer, but the sufficiency<sup>6</sup> or otherwise of any such affidavit objected to as insufficient shall be determined by the court or a judge on motion or summons.” Rule 11, then provides, that

<sup>1</sup> *Fisher v. Owen*, L. R., 8 Ch. D. 646, 654, per Cotton, L. J.; clearing up a doubt expressed in *Saunders v. Jones*, L. R., 7 Ch. D. 435.

<sup>2</sup> L. R., 9 App. Cas. 81.

<sup>3</sup> R. 8.

<sup>4</sup> R. 9, and Form 7, App. B., which, like Form 6, is all but valueless, being as follows:—

“In the High Court of Justice,  
Division.

18 [*Here put the letter and number.*]

Between A. B., plaintiff,  
and

C. D., E. F., and G. H., defendants.

The answer of the above-named E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say as follows:—

<sup>5</sup> See *Webb v. Bornford*, 46 L. J., Ch. 288, per Hall, V.-C.

<sup>6</sup> The Court, under Rules 10 & 11, must consider the *sufficiency* in law, not the *truth* in fact, of the answer; and in the event of insufficiency alone will a further answer be required; *Lyell v. Kennedy*, 53 L. J., Ch. 937, per Ct. of App.; S. C., L. R., 27 Ch. D. 1. A few such cases as this one would go very far towards inducing the Legislature to sweep away the whole law relating to Discovery and Interrogatories.

"If any person interrogated *omits to answer* or answers *insufficiently*, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or answer further, either by affidavit or by *viva voce* examination, as the judge may direct." A summons under this rule, as under the rule authorising applications to strike out interrogatories, must specify the particular questions or parts of questions to which a further answer is required;<sup>1</sup> unless, indeed, in a case where *all* the prior answers are objected to as amounting to an abuse of the practice of the court.<sup>2</sup>

§ 530. Although the omission to answer interrogatories, when delivered *without leave* under the first clause of Rule 1, is not in itself a contempt of court, but only entitles the interrogator to apply to the court for an order under the rule just cited, the disobedience of an order so obtained is a much more serious matter; for the party failing to comply therewith is not only liable to attachment, but he may, if a plaintiff, have his action dismissed, and if a defendant, have his defence struck out.<sup>3</sup>

§ 531. It may be difficult to define *à priori*, what amounts to an insufficient answer, but it appears that in general the answers to interrogatories will be deemed insufficient, first, if they be not made categorically to each specific question;<sup>4</sup> and next, if the parties interrogated rely on their personal ignorance of facts, of which they might fairly be presumed to have cognisance, without showing that they had done their best to obtain from their servants or agents the

<sup>1</sup> *Anstey v. North & South Woolwich Subway Co.*, L. R., 11 Ch. D. 439; 48 L. J., Ch. 776, S. C.; *Chesterfield Colliery Co. v. Black*, 24 W. N. 783.

<sup>2</sup> *Furber v. King*, 50 L. J., Ch. 496.

<sup>3</sup> Rule 21 is as follows: "If any party fails to comply with any order to answer interrogatories, or for discovery, or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly." See post, § 1808.

<sup>4</sup> *Chester v. Wortley*, 18 Com. B. 239.

information required.<sup>1</sup> The same result, too, will follow, if, in addition to the information asked for, the answers contain in excess, either irrelevant or otherwise objectionable matter.<sup>2</sup> The party, however, who complains of the insufficiency must apply promptly to the judge, for otherwise he will decline to interfere.<sup>3</sup> The application should be made by summons in chambers, and not by motion, and the particular answers objected to should be specified.<sup>4</sup> It is also desirable, if not necessary, that at least in every case involving doubt, the application should be supported by affidavit, for the judges seem inclined to administer this branch of their jurisdiction with considerable caution.<sup>5</sup> The order for an oral examination may be drawn up in general terms, and it is neither necessary nor convenient to specify the particular points on which the party is to be interrogated.<sup>6</sup> When the oral examination takes place, it would seem, on principle, that the party should be allowed the assistance of counsel.<sup>7</sup> When the answers to interrogatories are formally, but, as far as can be seen, not intentionally, defective, the proper course to pursue is to apply at chambers to have them amended; for the court is reluctant to order further answers to be made, provided that the first be *substantially* sufficient.<sup>8</sup>

§ 532. In considering what questions may under these Rules be asked on interrogatories, the courts should be guided, though not fettered, by the rules and principles which the old Courts of Equity used to act upon with respect to discovery.<sup>9</sup> Judges must remember, that the right of discovery, as it formerly existed in the Court of

<sup>1</sup> *Bolckow v. Fisher*, 52 L. J., Q. B. 12, per Ct. of App.; L. R., 10 Q. B. D. 161, S. C. See *Rasbotham v. Shropshire Union Ry. Co.*, L. R., 24 Ch. D. 110; 53 L. J., Ch. 327, S. C.

<sup>2</sup> *Peyton v. Harting*, 43 L. J., C. P. 10; 9 Law Rep., C. P. 9, S. C.

<sup>3</sup> *Chester v. Wortley*, 18 Com. B. 239.

<sup>4</sup> *Chesterfield v. Baythorpe Colliery Co. v. Black*, 24 W. R., 783, per V.-C. Hall.

<sup>5</sup> *Swift v. Nun*, 26 L. J., Ex. 365.

<sup>6</sup> *Peyton v. Harting*, 43 L. J., C. P. 10; 9 Law Rep., C. P. 9, S. C.

<sup>7</sup> *Id.*

<sup>8</sup> *Bender v. Zimmerman*, 29 L. J., Ex. 244.

<sup>9</sup> *Pye v. Butterfield*, 34 L. J., Q. B. 17; 5 B. & S. 829, S. C.; *Whateley v. Crowter*, 5 E. & B. 712, per Ld. Campbell; *Dalrymple v. Leslie*, L. R., 8 Q. B. D. 5; 51 L. J., Q. B. 61, S. C.

Chancery, still exists in the High Court, except so far as it is modified by the Judicature Acts and the General Orders; and consequently, that a party has still a right to exhibit interrogatories not only for the purpose of obtaining from his opponent information respecting material facts which are not within his own knowledge and are within the knowledge of the party interrogated, but also for the purpose of obtaining from the opponent admissions which will save the necessity of proving the facts admitted.<sup>1</sup> A defendant, therefore, has been held bound to give his version of a material conversation between himself and the plaintiff's solicitor, as also to answer interrogatories respecting the existence of a right of way claimed by the plaintiff and disputed by himself.<sup>2</sup> So, also, in an action for the recovery of land upon a legal title, which is analogous to the old action of ejectment, a plaintiff has a right to interrogate the defendant, or to obtain admissions from him as to the title upon which he the plaintiff himself relies.<sup>3</sup> But, on the other hand, a tenant cannot be compelled by his landlord to answer interrogatories, where the answer would tend to show that he had incurred a forfeiture of his lease by reason of his having underlet the premises.<sup>4</sup> Nor will a defendant, in an action of libel, be required to give the *substance* of letters written by him, when he has no copies and avers that he cannot recollect the exact language he used.<sup>5</sup> Indeed, as a general rule, a party cannot inquire into facts which relate *exclusively* to the case of his adversary, although he will occasionally be allowed to do so, when he makes a claim as the representative of a deceased person, and the defence set up consists of transactions said to have taken place with that person, and to be exclusively within the knowledge of the defendant.<sup>6</sup> A party may

<sup>1</sup> Att.-Gen. v. Gaskill, L. R., 20 Ch. D. 519, per Ct. of App.; 51 L. J., Ch. 870, S. C.

<sup>2</sup> Id.

<sup>3</sup> Lyell v. Kennedy, L. R., 8 App. Cas. 217; and 52 L. J., Ch. 385, per Dom. Proc., overruling S. C., 51 L. J., Ch. 409, per Ct. of App.; L. R., 20 Ch. D. 484, S. C.

<sup>4</sup> Pye v. Butterfield, 34 L. J., Q. B. 17; 5 B. & S. 829, S. C.; Bp. of Cork v. Porter, 11 C. L. 94. See, also, Eade v. Jacob, 47 L. J., Ex. 74, per Ct. of App.; L. R., 3 Ex. D. 335, S. C.

<sup>5</sup> Dalrymple v. Leslie, L. R., 8 Q. B. D. 5; 51 L. J., Q. B. 61, S. C.

<sup>6</sup> Hills v. Wates, 9 Law Rep., C. P. 688; 43 L. J., C. P. 380, S. C.; Hawkins v. Carr, and Parsons v. Carr, 35 L. J., Q. B. 81; 1 Law Rep., Q. B. 89; and 6 B. & S. 995, S. C.; Eade v. Jacob, 47 L. J., Ex. 74, per Ct. of App.; L. R., 3 Ex. D. 337, S. C.

also ask any questions, the answers to which will advance his own case, even though they may also disclose his opponent's case.<sup>1</sup> For instance, in an action on a policy of insurance on a cargo, claiming for a total loss, if the statement of defence only denies the policy, the interest, and the loading, the plaintiff cannot be interrogated as to the several matters which these traverses will require him to prove; but if there be also a denial of the loss, interrogatories may be tendered with respect to the amount of damage; and if the defendant were further to allege that the sailing of the vessel had been unreasonably delayed, the plaintiff might be questioned with respect to that fact.<sup>2</sup>

§ 533. On the same ground, if an action for negligence be brought against a surveyor or solicitor, the defendant may be asked what steps he has taken to perform his duty;<sup>3</sup> and if a valuer has been employed to put a price on the goodwill of a business, he may, for the purpose of establishing want of skill, be questioned as to the basis of his valuation.<sup>4</sup> So in an action for seduction, a defendant may be interrogated with the view of obtaining from him an admission of his immoral conduct, though no question can be asked him with respect to his means or property.<sup>5</sup> So, where the plaintiff had brought an action for money had and received, and his right to recover rested on the assumption that the defendant had, in selling certain property to him, falsely professed to act as broker for a third party, the Court allowed interrogatories to be delivered to the defendant, requiring him to answer whether he had acted in the transaction as principal or agent, and, if as agent, to name his principal.<sup>6</sup> So, where, to an action for wrongful dismissal brought by the manager of a business against his employer, the statement of defence alleged in general terms acts of misconduct on the part of

<sup>1</sup> *Bayley v. Griffiths*, 31 L. J., Ex. 477; 1 H. & C. 429, S. C.; *Goodman v. Holroyd*, 15 Com. B., N. S. 839; *Stewart v. Smith*, 2 Law Rep., C. P. 293.

<sup>2</sup> *Zarifi v. Thornton*, 26 L. J., Ex. 214.

<sup>3</sup> *Whateley v. Crowter*, 5 E. & B. 709.

<sup>4</sup> *Turner v. Goulden*, 9 Law Rep., C. P. 57; 43 L. J., C. P. 60, S. C.

<sup>5</sup> *Hodsoll v. Taylor*, 43 L. J., Q. B. 14; 9 Law Rep., Q. B. 79, S. C.

<sup>6</sup> *Thöl v. Leash*, 10 Ex. R. 704. See, also, *Blight v. Goodliffe*, 18 Com. B., N. S. 757.



the plaintiff justifying his dismissal, the court held that the plaintiff was at liberty to exhibit interrogatories, which in substance asked the defendant, not indeed to state the evidence he was about to adduce, but to specify the acts of misconduct on which he relied.<sup>1</sup> This last case illustrates the principle, that, whenever a summons might be taken out for better particulars, the same information may be obtained by the aid of an interrogatory.<sup>2</sup> It means no more than this; nor will the court allow the use of interrogatories as an indirect mode of seeing the adversary's brief, and of ascertaining the details of the evidence on which he is about to rely.<sup>3</sup>

§ 534. When a party, on being interrogated as to whether he had in his possession any deeds relating to the lands in dispute, answered on oath that he had, but that such deeds were exclusively the evidences of his own title to the property, and did not show any title in his opponent, the court held that he could not be compelled to state the contents of the documents, or to describe them, but that his oath as to their effect must be deemed conclusive.<sup>4</sup> If *prima facie* evidence of the loss of a deed be made out by affidavit, the party supposed to have executed the instrument may be interrogated *de bene esse* as to its contents.<sup>5</sup> Although interrogatories as to the means by which a defendant proposes to establish his title to an hereditament are not admissible, those seeking only to ascertain the character of his title, and the quality of his possession, will, it is said, be allowed.<sup>6</sup> Again, a plaintiff seeking to recover land may interrogate the defendant as to whether he is not really defending the action on behalf of a third person; for an affirmative answer to such a question would go far towards making the declarations of such third person admissible in evidence.<sup>7</sup> § 482B

§ 535. It may be laid down as a general rule, that no party will § 482C

<sup>1</sup> *Saunders v. Jones*, L. R., 7 Ch. D. 435, per Ct. of App.; 47 L. J., Ch. 440, S. C.; *Lyon v. Tweddell*, L. R., 13 Ch. D. 375.

<sup>2</sup> *Benbow v. Low*, 50 L. J., Ch. 35, per Ct. of App.

<sup>3</sup> *Id.*

<sup>4</sup> *Adams v. Lloyd*, 3 H. & N. 351.

<sup>5</sup> *Wolverhampton New Waterw. Co. v. Hawksford*, 5 Com. B., N. S. 703.

<sup>6</sup> *Towne v. Cocks*, 43 L. J., Ex. 41; 9 Law Rep., Ex. 45, S. C.

<sup>7</sup> *Sketchley v. Conolly*, 2 New R. 23, per Q. B.

be suffered to expose his adversary to fishing interrogatories, or to require him to declare on oath how he intends to shape his case.<sup>1</sup> For example, in an action of trover by the trustee of a bankrupt, the plaintiff could not be compelled to answer interrogatories for the purpose of discovering what case he intends to set up at the trial.<sup>2</sup> The defendant, too, in an action of slander will not,—except under very special circumstances, precluding redress by other means,<sup>3</sup>—be forced to admit, in answer to interrogatories, the precise words he uttered, and when, where, and to whom he spoke them.<sup>4</sup> Neither can the defendant, in an action for negligence, interrogate the plaintiff as to how the accident happened, or what was the extent of the injury, or what was the amount of the medical charges.<sup>5</sup> Still less will a judge, except under very special circumstances,<sup>6</sup> permit a defendant, who admits a breach of contract, to interrogate the plaintiff respecting the damage he has sustained, with the view of paying money into court.<sup>7</sup> Nor, as it seems, will interrogatories be allowed, when the interrogator has ample means of obtaining from his own agents the information which he professes to seek from his opponent,<sup>8</sup> or when the object

<sup>1</sup> *Edwards v. Wakefield*, 6 E. & B. 462; *Moor v. Roberts*, 26 L. J., C. P., 246; 2 Com. B., N. S. 671, S. C.

<sup>2</sup> *Edwards v. Wakefield*, 6 E. & B. 462. See, also, *Finney v. Forward*, 35 L. J., Ex. 42; 1 Law Rep., Ex. 6; and 4 H. & C. 33, S. C. But see *Derby Bk. v. Lumsden*, 5 Law Rep., C. P. 107; 39 L. J., C. P. 72, S. C.

<sup>3</sup> *Atkinson v. Fosbroke*, 35 L. J., Q. B. 182; 1 Law Rep., Q. B. 628; 7 B. & S. 618, S. C.; *Greenfield v. Reay*, 45 L. J., Q. B. 81; 10 Law Rep., Q. B. 217, S. C. See *O'Connell v. Barry*, 1 I. R. 2 C. L. 648. Sed qu.

<sup>4</sup> *Stern v. Sevastopulo*, 2 New R. 329; 32 L. J., C. P. 268; 14 Com. B., N. S. 737, S. C.; *Tupling v. Ward*, 30 L. J., Ex. 222; 6 H. & N. 749, S. C.; *Edmunds v. Greenwood*, 4 Law Rep., C. P. 70; 38 L. J., C. P. 115, S. C. See *Hill v. Campbell*, 44 L. J., C. P. 97; 10 Law Rep., C. P. 222, S. C.; *Fitzgibbon v. Greer*, 1 I. R., 9 C. L. 294. But see, also, *M'Loughlin v. Dwyer*, 1 I. R., 9 C. L. 170.

<sup>5</sup> *Peppiatt v. Smith*, 3 H. & C. 129; 33 L. J., Ex. 239, S. C. But see *Wright v. Goodlake*, 34 L. J., Ex. 82; 3 H. & C. 540, S. C.

<sup>6</sup> See *Horne v. Hough*, 43 L. J., C. P. 70; 9 Law Rep., C. P. 135, S. C.

<sup>7</sup> *Jourdain v. Palmer*, 35 L. J., Ex. 69; 4 H. & C. 171; and 1 Law Rep., Ex. 102, S. C., commenting on *Wright v. Goodlake*, 34 L. J., Ex. 82; 3 H. & C. 540, S. C. See *Dobson v. Richardson*, 37 L. J., Q. B. 261; 3 Law Rep., Q. B. 778; and 9 B. & S. 516, S. C.

<sup>8</sup> *Bird v. Malzy*, 1 Com. B., N. S. 308. But see *Rew v. Hutchins*, 10 Com. B., N. S. 837, per Erle, C. J.

is to contradict a written instrument,<sup>1</sup> or to gain some tricky advantage not dependent on real information, or to heap up needless costs.<sup>2</sup> Moreover, it has been established as a general rule, that the party interrogated is not bound to disclose any information, which he may have obtained for the purposes of the litigation in which he is engaged.<sup>3</sup>

§ 536. It may further be laid down with respect to interrogatories, § 482D first, that where a party interrogated under Rule 1 of Order XXXI. admits his possession of documents, he cannot be attached for refusing to set forth their contents, but his opponent must apply for an order to inspect them, under Rule 15 of the same Order;<sup>4</sup> secondly, that interrogatories as to documents are not limited to such as *are* in the possession or power of the party interrogated; but extend to all documents, "relating to the matter in question," which he has *ever had* in his possession;<sup>5</sup> thirdly, that a plaintiff may be ordered to answer interrogatories, though he be a foreigner resident abroad;<sup>6</sup> fourthly, that where an application for leave to deliver interrogatories is necessary,<sup>7</sup> such application,—provided it be made *bona fide*,<sup>8</sup> and be supported by an affidavit disclosing special circumstances,<sup>9</sup>—cannot be resisted on an affidavit that the questions, if answered, may tend to criminate the party interrogated,<sup>10</sup> or may expose him to a forfeiture of his estate;<sup>11</sup>

<sup>1</sup> *Moor v. Roberts*, 26 L. J., C. P. 246; 2 Com. B., N. S. 671, S. C.

<sup>2</sup> *Bechervaise v. Gt. West. Ry. Co.*, 6 Law Rep., C. P. 36; 40 L. J., C. P. 8, S. C.

<sup>3</sup> *Phillips v. Routh*, 7 Law Rep., C. P. 287; 41 L. J., C. P. 111.

<sup>4</sup> See *Scott v. Zygomala*, 4 E. & B. 483; *Herschfield v. Clarke*, 11 Ex. R. 712; and post, § 1787. <sup>5</sup> *Lethbridge v. Cronk*, 44 L. J., C. P. 381.

<sup>6</sup> *Pohl v. Young*, 25 L. J., Q. B. 23.

<sup>7</sup> See ante, § 522.

<sup>8</sup> *Baker v. Lane*, 34 L. J., Ex. 57; 3 H. & C. 544, S. C., as explained away in *Bickford v. D'Arcy*, 35 L. J., Ex. 202; 4 H. & C. 540, S. C.

<sup>9</sup> *Villeboisnet v. Tobin*, 38 L. J., C. P. 146; 4 Law Rep., C. P. 184, S. C.; *Inman v. Jenkins*, 39 L. J., C. P. 258; 5 Law Rep., C. P. 738, S. C.

<sup>10</sup> *Osborn v. London Dock Co.*, 10 Ex. R. 698, noticed post, § 1466; *M'Fadzen v. May & Corp. of Liverpool*, 3 Law Rep., Ex. 279; 37 L. J., Ex. 193, S. C.; *Bartlett v. Lewis*, 31 L. J., C. P. 230; 12 Com. B., N. S. 249, S. C.; *Goodman v. Holroyd*, 15 Com. B., N. S. 839; *Simpson v. Carter*, 30 L. J., Ex. 224, in n. 7. But see cases cited ante, p. 464, n. 4, as to actions for defamation.

<sup>11</sup> *Chester v. Wortley*, 17 Com B. 410; *Bickford v. D'Arcy*, 35 L. J., Ex. 202; 1 Law Rep., Ex. 354; and 4 H. & C. 534, S. C. See *Pye v. Butterfield*, 34 L. J., Q. B. 17, cited ante, § 532.

fifthly, that when a party submits to answer interrogatories he must answer fully;<sup>1</sup> sixthly, that the rule under discussion extends equally to real and nominal parties;<sup>2</sup> and lastly, that it does not apply to criminal proceedings, or to actions for penalties.<sup>3</sup>

§ 537. As it is still necessary in certain events<sup>4</sup> to obtain the leave of the court or a judge before delivering interrogatories, it may be mentioned, as a guide for the exercise of judicial discretion, that, under the old law,<sup>5</sup> the party proposing to interrogate, or his solicitor or agent, was obliged to file an affidavit, stating his *belief* that the party, whether plaintiff or defendant, would *derive material benefit in the cause* from the discovery sought, that there was a *good cause of action or defence on the merits*, and, if the applicant was a defendant, that the discovery was not *sought for the purpose of delay*.<sup>6</sup>

§ 538. As answers to interrogatories under the Rules of 1883,—like those which preceded them,—were intended as substitutes for the old proceedings in Chancery to compel discovery, they are equally admissible in evidence with these proceedings. The party, at whose instance they are taken, is empowered to use them, either as primary evidence of admissions made by his opponent, or as furnishing matter for cross-examination, and, if necessary, for contradiction, should his opponent come forward as a witness on his own behalf, and make statements inconsistent with what he may have previously sworn.

§ 539. In the County Courts the rules relating to interrogatories are as follows:—Order XIII. of the Rules of 1875 provides, by R. 6,

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<sup>1</sup> *Elmer v. Creasy*, 9 Law Rep., Ch. 69; *Gt. West. Cqll. Co. v. Tucker*, 9 Law Rep., Ch. 376, per Ct. of App.

<sup>2</sup> *M'Kewan v. Rolt*, 4 H. & N. 738; *Mason v. Wythe*, 3 Fost. & Fin. 153, per Keating, J.

<sup>3</sup> *Humblings v. Williams*, 52 L. J., Q. B. 273.

<sup>4</sup> See ante, § 522.

<sup>5</sup> 17 & 18 V., c. 125, § 52. Now repealed by 46 & 47 V., c. 49.

<sup>6</sup> See *May v. Hawkins*, 11 Ex. R. 210; *Oxlade v. N. East. Ry. Co.*, 12 Com. B., N. S. 350; *Kingsford v. Gt. West. Ry. Co.*, 16 Com. B., N. S. 761; 33 L. J., C. P. 307, S. C.

that, "where a party desires to interrogate any party he shall apply to the registrar for leave to deliver interrogatories, and upon making such application he shall file an affidavit,<sup>1</sup> made by himself only, or by himself and his solicitor or agent, if any, or by leave of the registrar by his solicitor or agent only, stating that the deponent believes that the party proposing to interrogate will derive material benefit in the action from the discovery which he seeks, and that there is good cause of action or defence upon the merits. And upon such application the registrar shall make an order, according to the form<sup>2</sup> in the schedule, that the applicant may, within a time to be named in such order, deliver to the party to be interrogated interrogatories in writing upon any matter as to which the applicant seeks discovery, and shall in such order require the party interrogated to answer the questions in writing by affidavit, and file such answers within such time to be appointed by the registrar, as shall enable the party making the application to use the answers so returned as evidence at the trial."

§ 540. Rule 7 provides, that "where a party served with the

<sup>1</sup> Form 57 is as follows:—

"We, A. B,                      of                      the above-named plaintiff [*or* defendant], and L. M. of                      , solicitor in this cause for the said plaintiff [*or* defendant], make oath and say, first,—

And I the said A. B. for myself say,—

1. That I believe that I shall derive material benefit in this cause from the discovery which I seek by the interrogatories which I require to be delivered herein.

2. That I believe that I have a good cause of [*or* defence to this] action on the merits.

And I the said L. M. say,—

3. That the plaintiff [*or* defendant] will derive material benefit by the discovery which he seeks by interrogatories.

4. That I believe that the plaintiff [*or* defendant] has a good cause of [*or* defence to this] action on the merits."

<sup>2</sup> Form 285 of the Cy. Ct. Rules, 1876, is as follows:—

"Upon reading the affidavit of                      I do order that the be at liberty to deliver to the                      or his solicitor, on or before the day of                      18                      interrogatories in writing upon the matters as to which discovery is sought in this action, and that the                      do, on or before the                      day of                      18                      , answer the questions in writing by affidavit, and return such answers to me for filing.

Dated this                      day of

Registrar or Judge."

order shall object to answer the interrogatories, he shall file an affidavit stating his grounds for objecting, and that he will be prepared to show cause to the court at the return-day against his being required to answer them, but where it is only some of the interrogatories he objects to answer, he may include in his affidavit both his replies and his objections."

§ 541. Independent of these rules, the County Court, by virtue of § 53 of the Common Law Procedure Act, 1854,<sup>1</sup> may, in case any party omits to answer *sufficiently* any written interrogatories, direct him to be *orally examined* either before itself or the registrar, as to such points as it may direct; and it may also command the attendance of the party for the purposes of the examination, and the production of documents, and may impose such terms as to costs or otherwise as shall seem just. In the event of the registrar being directed to take the examination, either he or his clerk must transcribe the answers given by the party, he must himself read over the answers so transcribed, the party must then sign his name at the foot thereof, and finally the document must be filed by the registrar as the deposition of the party.<sup>2</sup>

- § 542. Rule 8 of Order XIII. further provides, that "where the party required to answer interrogatories shall successfully show cause against an order requiring him to answer them, the judge may direct the action to proceed, or to be adjourned if he thinks fit, and upon terms as to costs; but if the party objecting shall not show sufficient cause for his objection, the judge may order the interrogatories to be then and there answered *viva voce* in Court, or may adjourn the action, and make an order for the answering of the interrogatories by such time, and for the payment of such costs as may have been incurred through the delay, as he may think fit."

§ 542A. The County Court Rules, 1883, substantially adopting an Order of the Supreme Court,<sup>3</sup> have provided by Rule 11, that "any

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<sup>1</sup> 17 & 18 V., c. 125, § 53, is now repealed, but its repeal does not affect its extension to the Cy. Cts. by ord. of Council, 18 Nov. 1867. See 46 & 47 V., c. 49, § 5, subs. (e).

<sup>2</sup> Ord. xiv. of Cy. Ct. Rules, 1875, r. 7.

<sup>3</sup> See post, § 731.

party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others; Provided always that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

§ 542a. It may here be noticed that the High Court has no power to order interrogatories to be delivered to a respondent in a Parliamentary Election Petition.<sup>1</sup> Neither can an order be made against the sitting member for the inspection and discovery of documents.<sup>2</sup> But independent of the Rules of the Supreme Court, 1883, which do not apply to the case,<sup>3</sup> the practice in the Divorce Division is to allow interrogatories, and that practice has recently been followed in a suit for nullity of marriage.<sup>4</sup>

§ 543. Before courts of law were empowered to issue commissions for themselves, it was often necessary to institute proceedings in Chancery as auxiliary to an action at law; and in such cases, recourse was had to what was called "an action for perpetuating testimony." § 489

§ 544. The Legislature, considering that the benefits derivable from this mode of proceeding might with advantage be extended, passed two Acts for that purpose, one in the year 1842;<sup>5</sup> and the other in 1858. The earlier Act is now repealed, but its provisions have been substantially embodied in Order XXXVII. R. 35, of the Rules of the Supreme Court, 1883.<sup>6</sup> That rule provides, that "any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate"<sup>7</sup> § 489

<sup>1</sup> See 31 & 32 V., c. 125, §§ 2 & 26; and *In re Wallingford Petition*, 49 L. J., C. P. 681; S. C. nom. *Wells v. Wren*, L. R., 5 C. P. D. 546.

<sup>2</sup> *Moore v. Kennard*, Salisbury Elect. Pet., L. R., 10 Q. B. D. 200; 52 L. J., Q. B. 285, S. C.

<sup>3</sup> See Ord. LXVIII.

<sup>4</sup> *Euston v. Smith*, L. R., 9 P. D. 57.

<sup>5</sup> 5 & 6 V., c. 69; repealed by 46 & 47 V., c. 49.

<sup>6</sup> Proceedings under this rule should be jealously watched, *Campbell v. E. of Dalhousie*, 1 Law Rep., H. L. Sc. 462.

<sup>7</sup> See *Re Stoer*, L. R., 9 P. D. 120, per Ct. of App.

or interest in any property real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim." The other statute relating to this subject, which is called "The Legitimacy Declaration Act, 1858,"<sup>1</sup> is still in force, and it empowers the Divorce Division of the High Court, on the petition of certain persons specially interested, to make decrees declaratory of the legitimacy or illegitimacy of any such petitioner, or of the validity or invalidity of the marriage of his parents, or grandparents, or of his own marriage, or of his right to be deemed a natural-born subject.

§ 545. In entertaining an action to perpetuate testimony,— § 490  
which action must have "been commenced for the purpose," or no witness will be allowed to be examined,<sup>2</sup>—the court will compel the defendant to appear and answer,<sup>3</sup> provided he be shown to have an interest in contesting the plaintiff's claim in the subject of the proposed evidence;<sup>4</sup> and the cause being brought to issue, the witnesses will, it is presumed, be examined orally before one of the examiners of the court, in accordance with the practice established for ordinary actions under Ord. XXXVII. R. 5.<sup>5</sup> The depositions will then be taken down, signed, authenticated, and transmitted to the Central Office, in the same manner as in other cases,<sup>6</sup> though no relief being prayed, the action must not be set down for trial.<sup>7</sup> The court will not, in general, admit the depositions as evidence,<sup>8</sup> except in support of an action, nor then, unless it be proved that the witnesses are dead, or otherwise incapable of attending to be examined.<sup>9</sup> So, if a witness in imminent danger of death has

<sup>1</sup> 21 & 22 V., c. 93, §§ 1, 2; extended to Ireland by 31 & 32 V., c. 20, Ir.

<sup>2</sup> Ord. XXXVII., R. 37.

<sup>3</sup> See *Ellice v. Roupell*, 2 New R. 3, per Romilly, M. R.; *id.* 150, S. C.; and 32 Beav. 299, 308, & 318, on other points. <sup>4</sup> *Mitf. Pl.* 63.

<sup>5</sup> See *Litton v. Murphy*, 1 L. R., Ir. 301, which case was decided on the corresponding Irish order, Ord. xxxvi., r. 6.

<sup>6</sup> Ord. XXXVII., RR. 12, 16.

<sup>7</sup> Ord. XXXVII., R. 38.

<sup>8</sup> In cases where the Crown has an interest, the Att.-Gen. may be made defendant, and no objections can then be taken to the depositions on the ground that the Crown was not a party to the action, Ord. XXXVII., R. 38.

<sup>9</sup> 1 *Smith's Ch. Pr.* 769; *Morrison v. Arnold*, 19 Ves. 670. See *Att-Gen. v. Ray*, 2 Hare, 518.



been examined *de bene esse* under the authority of the ecclesiastical courts, the deposition cannot be read, unless proof be given that the witness has since died, or is too ill to be again examined at the hearing of the cause.<sup>1</sup>

§ 546. It was stated in the last chapter, that if a witness, besides § 491  
being examined on interrogatories, should testify at the trial of a cause, either party, on any subsequent trial respecting the same subject, provided the witness be then incapable of attending, may rely, at his option, either on the deposition, or on the previous *viva voce* testimony;<sup>2</sup> and it may be here observed,<sup>3</sup> that what such witness has orally testified may be proved, either by any person, who will swear from his own memory,<sup>4</sup> or by notes taken at the time by any person, who will swear to their accuracy,<sup>5</sup> or possibly, from the necessity of the case, by the judge's notes.<sup>6</sup> This last mode of proof, however, is open to very grave, if not insuperable, objections, as such notes form no part of the record, nor is it the duty of the judge to take them, nor have they the sanction of his oath to their accuracy or completeness.<sup>7</sup> How far it may be necessary to prove the *precise words* spoken, does not clearly appear. Lord Kenyon mentions a case, where the evidence of a witness was rejected, "as he could not undertake to give the words, but merely to swear to the effect of them;"<sup>8</sup> and the same precision has, on several occasions, been deemed requisite in America;<sup>9</sup> but on the other hand, it has been urged with much force,<sup>10</sup> that to insist upon

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<sup>1</sup> *Wequelin v. Wequelin*, 2 Curt. 263.

<sup>2</sup> *Tod. v. E. of Winchelsea*, 3 C. & P. 387, per Ld. Tenterden, ante, § 400.

<sup>3</sup> Gr. Ev. § 166, in part.

<sup>4</sup> *Strutt v. Bovingdon*, 5 Esp. 56, per Ld. Ellenborough; *May. of Doncaster v. Day*, 3 Taunt. 262; *R. v. Jolliffe*, 4 T. R. 290, per Ld. Kenyon.

<sup>5</sup> *May. of Doncaster v. Day*, 3 Taunt. 262.

<sup>6</sup> *Id.* 262, per Sir. J. Mansfield.

<sup>7</sup> *Conradi v. Conradi*, 1 Law Rep., P. & D. 514, per Wilde, J. O.; *Miles v. O'Hara*, 4 Binn. 108; *Foster v. Shaw*, 7 Serg. & R. 156; *Ex parte Learmouth*, 6 Madd. 113.

<sup>8</sup> *R. v. Jolliffe*, 4 T. R. 290.

<sup>9</sup> *U. S. v. Wood*, 3 Wash. 440; *Foster v. Shaw*, 7 Serg. & R. 163; *Wilbur v. Selden*, 6 Cowen, 165; *Com. v. Richards*, 18 Pick. 434.

<sup>10</sup> Gr. Ev. § 165.

strict accuracy, goes, in effect, to exclude this sort of evidence altogether, or to admit it only in cases, where the particularity and minuteness of the witness's narrative, and the exactness with which he undertakes to repeat every word of the deceased's testimony, ought to excite just doubts of his own honesty, and of the truth of his evidence.<sup>1</sup>

§ 547. Perhaps, therefore, on occasions when nothing of importance turns on the precise expressions used, it will be considered sufficient if the witness can speak with certainty to the substance of what was sworn on the former trial. Even on indictments for perjury it is not necessary to state the entire examination, but it will suffice to narrate, with accuracy, the whole of that portion of the evidence which relates to the point on which the perjury is assigned, provided the witness can further swear that he heard the whole examination, and that nothing was subsequently said to qualify the original statement.<sup>2</sup> Unless he can do this his evidence cannot be received;<sup>3</sup> and as the same rule must apply to the proof of the testimony of a deceased witness, it follows that if the person who heard him give his evidence can only state what was said on the examination in chief, without also giving the substance of his answers in cross-examination, or, at least, positively swearing that nothing escaped the witness, which could vary or qualify the first statement, his evidence will be inadmissible.<sup>4</sup>

§ 548. When depositions are tendered in evidence as secondary proof of oral testimony, they are, of course, open to all the objections which might have been raised, had the witness himself been personally present at the trial. Leading and other illegal questions are therefore constantly suppressed, together with the answers to them; and this, too, whether the testimony has been taken viva

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<sup>1</sup> See *Cornell v. Green*, 10 Serg. & R. 14, 16; *Miles v. O'Hara*, 4 Binn. 108; *Caton v. Lenox*, 5 Rand. 31, 36; *Jackson v. Bailey*, 2 Johns. 17.

<sup>2</sup> *R. v. Rowley*, 1 Moo. C. C. 111; *R. v. Dowlin*, Pea. R. 170.

<sup>3</sup> *R. v. Jones*, Pea. R. 38.

<sup>4</sup> *Wolf v. Wyeth*, 11 Serg. & R. 149.

voce or by written interrogatories.<sup>1</sup> But a party cannot repudiate an answer which has been given to an illegal question put on his own side;<sup>2</sup> and in all cases where objections are taken to interrogatories on the ground of their being couched in a leading form, the judge is vested with a wide discretion as to how much, if any, of the depositions returned he will in consequence strike out.<sup>3</sup> Where a witness, on being examined upon interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced, *that part*<sup>4</sup> of the deposition was suppressed at the trial, though it was urged, that as the witness was beyond the jurisdiction of the court, no means existed for compelling the production of the letter.<sup>5</sup> "We have no power," said Chief Justice Tindal, "to compel the witness to give any evidence at all; but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence."<sup>6</sup>

§ 549. In another case, a witness, with the view of showing that the defendants had used due diligence to obtain the answer of a party to a bill in Chancery, stated on interrogatories, that, as their agent, he had written to the party; and he then went on to describe the contents of the letter and of the reply, though he produced neither. At a subsequent trial this deposition was tendered in evidence and the court, while rejecting the answers which stated what the letters contained, admitted that part of the deposition which proved that the witness had written a letter to the party in question; for had the witness been himself present in court he might have been examined thus far, in order to prove that the defendants through him had used some exertion to procure the party's answer.<sup>7</sup> Again, depositions have been admitted, though the witness on his examination had refreshed his memory with some papers,

<sup>1</sup> *Hutchinson v. Bernard*, 2 M. & Rob. 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Small v. Nairne*; 13 Q. B. 840.

<sup>4</sup> In *Wheeler v. Atkins*, 5 Esp. 246, Ld. Ellenborough is reported to have held, under similar circumstances, that either the letter must be produced, or the *whole* interrogatory abandoned. But this case is clearly not law. See per Ld. Denman, in *Small v. Fairne*, 13 Q. B. 844.

<sup>5</sup> *Steinkeller v. Newton*, 9 C. & P. 319, per Tindal, C. J.

<sup>6</sup> *Id.*

<sup>7</sup> *Tufton v. Whitmore*, 12 A. & E. 370.

which he alleged were partly in his handwriting and partly not, but which he refused to allow the commissioners to see upon the ground that they were private memoranda; for, as it was a matter for the discretion of the commissioners, whether they would permit the witness to refer to papers during his examination, the learned judge, at the trial, presumed that they had exercised their discretion with propriety.<sup>1</sup>

§ 550. Another general rule, which governs the production of § 495 secondary evidence, whether of documents or of oral testimony, is, that the law recognises no *degrees* in the various kinds of such evidence.<sup>2</sup> If, therefore, a deed be lost, or be in the hands of the adversary, who after due notice refuses to produce it, the party seeking to give evidence of its contents may at once have recourse to parol testimony, though it be proved that he has in his possession a counterpart, a copy, or an abstract of the document.<sup>3</sup> So, if it be necessary to prove the former testimony of a deceased witness, any person who heard him examined may be called, though a clerk or a shorthand-writer may have taken down his evidence word for word.<sup>4</sup>

§ 551. This rule, of course, does not mean that the mere memory § 495 of a witness, who has read a deed, is entitled to equal weight with an authenticated copy of the same instrument; for in many cases a jury would properly regard such evidence with distrust, and if it should appear that more satisfactory proof was intentionally withheld, their distrust might amount to absolute incredulity; but the

<sup>1</sup> *Steinkeller v. Newton*, 2 M. & Rob. 372, per Tindal, C. J.

<sup>2</sup> *Doe v. Ross*, 7 M. & W. 102; 8 Dowl. 389, S. C.; *Hall v. Ball*, 3 M. & Gr. 242; 3 Scott, N. R. 577, S. C.; *Brown v. Woodman*, 6 C. & P. 206, per Parke, B.; *Jeans v. Wheedon*, 2 M. & Rob. 486, per Cresswell, J.

<sup>3</sup> Cases in last note; also, *Sugden v. Ld. St. Leonards*, L. R., 1 P. D. 154; 45 L. J., P. D. & A. 1 & 49, S. C.; *Brown v. Brown*, 27 L. J., Q. B. 173; 8 E. & B. 876, S. C.; *In re Brown*, 27 L. J., Pr. & Mat. 20; 1 Swab. & Trist, 32, S. C.; and *In re Gardner*, 27 L. J., Pr. & Mat. 55; 1 Swab. & Trist. 109, S. C.; in which cases oral evidence of the contents of a lost will was admitted. See *Johnson v. Lyford*, 37 L. J., Pr. & Mat. 65; 1 Law Rep., P. & D. 546, S. C.; also, ante, § 436.

<sup>4</sup> *Jeans v. Wheedon*, 2 M. & Rob. 486, per Cresswell, J. See *R. v. Christopher*, 4 Cox, 96; 1 Den. 533; 2 C. & Kir. 994, S. C.

rule simply applies to the legal admissibility of the evidence, and is founded on the inconvenience that could not fail to arise in the administration of justice, if the degrees of secondary evidence were strictly marshalled according to their intrinsic weight, and if parties were consequently driven, before they could have recourse to parol testimony, to account for all secondary evidence of superior value, the very existence of which they might have no means of ascertaining.

§ 552. In considering the practical effect of this rule, care must be taken to *exclude from its operation* those cases in which the law has expressly substituted, in the place of primary proof, some particular species of secondary evidence. Thus, for instance, where the contents of public records and documents are to be proved, examined copies, and, in some cases, office or certified copies, are, on grounds of general convenience, considered admissible;<sup>1</sup> and such copies, though in strictness secondary evidence, partake so much of the character of primary proof, that so long as it is possible to produce them, other inferior degrees of secondary evidence cannot be received.<sup>2</sup> Parol testimony, therefore, can only be admitted, on proof, first, that the public record or document has itself been lost or destroyed, for otherwise a copy might be obtained; and, secondly, that such copy, if any has been taken, is no longer under the control of the party relying upon less satisfactory evidence.<sup>3</sup> In like manner, if a witness has been examined before a magistrate or coroner under such circumstances, that these officers respectively have, in pursuance of their duty, taken down his statement in writing, parol evidence of his examination cannot be given in the event of his death, so long as the deposition itself can be produced; for the law, having constituted the deposition as the authentic medium of proof, will not permit the admission of any inferior species of evidence. If, indeed, it can be shown that the deposition is lost or destroyed, or is in the

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<sup>1</sup> Ante, § 439, and post, §§ 1534, 1545, 1598, et seq.

<sup>2</sup> Doe v. Ross, 7 M. & W. 106, per Ld. Abinger.

<sup>3</sup> Thurston v. Slatford, 1 Salk. 214, 285; Macdougall v. Young, Ry. & M. 392; 1 Ventr., 257.

possession of the opposite party, who after notice refuses to produce it, the statement of a witness who was present at the examination will then be admissible, as well as a copy of the deposition.<sup>1</sup>

§ 553. The rule which includes in one legal category every species of secondary proof, by no means opens a door to all sorts of evidence, however loose, which a party chooses to tender.<sup>2</sup> The contents, therefore, of a written instrument which is lost cannot be proved by means of a copy, until it be shown that such copy is accurate; and if, as frequently happens, a party to the suit has himself made a copy of a letter which he has sent to his adversary, this copy, should the adversary refuse to produce the letter after notice, cannot be read in evidence, unless the party who made it can swear to its accuracy, or some other witness can be called who has compared it with the original.<sup>3</sup> Neither can a document,—excepting in a very few cases by statutory authority,—be proved by the production of the copy of a copy,<sup>4</sup> for such evidence would be rejected on the broad ground which renders hearsay evidence inadmissible. The opponent would have a right to object that, assuming the second copy to correspond exactly with the first, the first must be produced and proved to have been compared with the original, or otherwise there would be nothing to show that the second copy and the original were identical. Such evidence would in fact be but the shadow of a shade.

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<sup>1</sup> See 2 Russ. C. & M. 895; *R. v. Wylde*, 6 C. & P. 380.

<sup>2</sup> *Everingham v. Roundell*, 2 M. & Rob. 138, per Alderson, B.

<sup>3</sup> *Fisher v. Samuda*, 1 Camp. 193, per Ld. Ellenborough. But see *Waldy v. Gray*, 20 Law Rep., Eq. 238, 250, per Bacon, V.-C.

<sup>4</sup> *Liebman v. Pooley*, 1 Stark. R. 167, per Ld. Ellenborough; *Everingham v. Roundell*, 2 M. & Rob. 138.

## CHAPTER VI.

## EVIDENCE ADDRESSED TO THE SENSES.

§ 554. THE first degree of evidence, and that which, though § 498 open to error and misconception, is obviously most satisfactory to the mind, is afforded by our own senses.<sup>1</sup> "Believe half what you yourself see, and a twentieth part of what you hear from others," is a maxim, which reflects severely upon human intelligence and veracity, but which, nevertheless, is founded in the main upon the experience of life, and marks the vast distinction that obtains between a knowledge of facts derived from actual perception, and the belief of the existence of facts resting on information. In judicial proceedings, the judge or jury can seldom act *entirely* upon evidence of this description, though, when pregnancy is pleaded, a jury of matrons is empowered to decide the issue upon examination of the person of the prisoner;<sup>2</sup> but in a vast number of instances, especially where the fact in dispute is sought to be proved by circumstantial evidence, the verdict will be found to rest materially upon matter submitted to the ocular inspection of the jury. Thus, if a prisoner be indicted for stealing corn, and one of the circumstances tending to establish his guilt be his possession of wheat apparently resembling a quantity from which a portion has been recently taken, it is evident that a comparison by the jury of the wheat found upon the prisoner with a sample of that belonging to the prosecutor, will be more satisfactory than if its identity be sworn to by a witness, who, out of court, has examined the two lots. It is true that the jury may come to an

<sup>1</sup> "Segnius irritant animos demissa per aures,  
Quam quæ sunt oculis subjecta fidelibus, et quæ  
Ipse sibi tradit spectator."—HOR. *Ars Poet.* l. 180.

So, also, in Shakespeare's "Rape of Lucrece," we read,—

"To see sad sights moves more than hear them told,  
For then the eye interprets to the ear."

<sup>2</sup> Baynton's case, 14 How. St. Tr. 630, 631, 634; 1 Hale, 368, 2 id. 413; R. v. Wycherley, 8 C. & P. 262. By this last case it appears, that the matrons may, in addition to their personal inspection, hear the evidence of a surgeon, but in that event he must be examined as a witness in open court. See *Lady Essex's case*, 2 How. St. Tr. 802.

erroneous conclusion in such a case; for either the witnesses, who state that the two parcels of wheat produced were respectively taken from the prisoner and the prosecutor, may intentionally or accidentally assert what is not true, or the jurors themselves may be mistaken in assuming the identity of the grain. Still, both these sources of error will equally exist, in the event of a witness being called to state the result of his previous examination of the two samples. And this last course will be further open to the objection, that such a witness may with little danger tell a fabricated story, since examination as to mere matters of opinion is almost necessarily inconclusive, and consequently the jury run the additional risk of being misled by his fraudulent testimony.

§ 555. These observations apply to all cases, in which the guilt or innocence of a prisoner depends upon the *identity* or *comparison* of two articles found in different places; as, for example, the wadding of a pistol with portions of a torn letter found on the person of the accused, or the fractured bone of a sheep with mutton found in his house, or fragments of dress with his rent garment, or damaged property with the instrument by which the damage is supposed to have been effected. In all these, and the like cases, it is highly expedient, if possible, to produce to the court the articles sought to be compared; and although the law, in demanding the production of the best evidence, does not expressly require that this course should be adopted, but permits a witness to testify as to his having made the comparison, without first proving that the article cannot be produced at the trial, their non-production, when unexplained, may often generate a suspicion of unfairness, and will always furnish an occasion for serious comment.<sup>1</sup> In illustration of this subject, reference may be made to an old case. A boy having found a diamond, took it to a jeweller, who refused to return it to him. An action of trover was brought, and as the jeweller declined to produce the diamond at the trial, the judge directed the jury to presume that it was of the finest water, and they found accordingly.<sup>2</sup> So, in the case of *Wood v.*

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<sup>1</sup> See ante, § 117.

<sup>2</sup> *Armory v. Delamirie*, 1 Str. 504; 1 Smith, L. C. 301, S. C. (3366)



Peel,<sup>1</sup> where the point at issue was whether the plaintiff's horse "Running Rein," who had won the Derby in 1844, was foaled by Mab in 1841, the production of the horse, in order to test the accuracy and credit of the witnesses who had sworn to its identity, was considered so material, that the plaintiff, being unable to comply with an order of the court to produce it, submitted very prudently to a nonsuit, rather than run the almost inevitable risk of a verdict in favour of the defendant.

§ 556. In many cases of this nature it will be advisable, in § 500  
order to guide the jury to a right decision, that persons conversant with the articles produced should be examined as to their opinion respecting the proof of identity. For instance, if the question be whether two samples of wine be drawn from the same bin, or two pieces of cloth be the produce of the same loom, or two coins be struck in the same die, it is important that a wine-merchant, a clothier, or an officer of the Mint,<sup>2</sup> should respectively be called, in order to furnish the court with suggestions founded on practical experience; because, in such inquiries, a jury composed of persons perhaps but little acquainted with these matters, can scarcely, without some extrinsic aid, be enabled to form a correct judgment respecting them. Still, even here the articles should be produced, that the jury may test the accuracy of the opinions expressed by the witnesses, and may perceive that the reasons, upon which those opinions are founded, correspond with the actual state and condition of the articles themselves.

§ 557. Though evidence addressed to the senses, if judiciously § 501:  
employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions, or

<sup>1</sup> Ex. Middx. Sittings after T. T., 1844, cor. Alderson, B., MS.

<sup>2</sup> 24 & 25 V., c. 99, § 29, provides, that, in order to prove coin to be counterfeit, it shall not be necessary to call any moneyer or other officer of the Mint, but that it shall be sufficient to prove that fact by the evidence of any other credible witness.

enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions, which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirist; and many amusing illustrations of its effect might be cited from our best authors. Shakespeare makes Jack Cade's nobility rest on this foundation: for Jack Cade having asserted, that the eldest son of Edmund Mortimer, Earl of March, "was by a beggar woman stolen away," "became a bicklayer when he came to age," and was his father; one of the rioters confirms the story, by saying, "Sir, he made a chimney in my father's house, and the bricks are alive at this day to testify it; therefore deny it not."<sup>1</sup> Archbishop Whately,—who makes use of the above anecdote in his diverting "Historic Doubts relative to Napoleon Buonaparte,"—adds, "Truly this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold." So, in the interesting story of "The Amber Witch," the poor girl charged with witchcraft,—after complaining that she was the victim of the sheriff, who wished to do "wantonness with her,"—added, that he had come to her dungeon the night before for that purpose, and had struggled with her, "whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, wherupon he had left her." To this the sheriff replied, "that it was his little lap-dog, called Below, which had scratched him, while he played with it that very morning," and having *produced the dog*, the court were satisfied with the truth of his explanation.<sup>2</sup>

§ 558. Turning once more to matters of graver import, it may § 509 be observed that in causes, either relating to disputed rights of way,

<sup>1</sup> Sec. Part of Hen. 6, act 4, scene 2.

<sup>2</sup> p. 28, 6th ed.

<sup>3</sup> Amber Witch, translated by Lady Duff Gordon, p. 78—80.

or involving some question which depends on the relative position of places, it is often desirable, that the jury should have an opportunity of *viewing the spot* in controversy;<sup>1</sup> since the knowledge derived by these means is far more satisfactory than any obtainable by the mere examination of maps and plans, which are often inaccurate and obscure, and may perhaps have been prepared with an express view to mislead. The attention of the Legislature having been drawn to this subject, a clause was inserted in the Jury Act of 1825,<sup>2</sup> which enacts in substance, that when in any case, either civil or criminal, or on any penal statute, depending in one of the superior courts of law, it shall appear proper that some of the jurors shall have a view of the place in question, in order to their better understanding the evidence that may be given at the trial, the court or a judge may order that a writ shall be drawn up for such purpose. As the machinery under this statute was needlessly cumbersome, a provision was introduced into the Common Law Procedure Act of 1852,<sup>3</sup> to simplify the practice by substituting a rule for a view in the place of the old writ; and the judges, in order further to facilitate the mode of procedure, subsequently passed a resolution, that "the rule for a view may, in all cases, be drawn up by the officer of the court, on the application of the party, without a motion for that purpose."<sup>4</sup>

§ 559. Still, as the Act of 1825 speaks merely of viewing "the place in question," a view could seldom be granted by the court, § 503

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<sup>1</sup> For an early instance of this practice, see *Mossam v. Ivy*, 10 How. St. Tr. 562, 631; a case tried in 1684.

<sup>2</sup> 6 G. 4, c. 50, §§ 23 & 24.

<sup>3</sup> 15 & 16 V., c. 76, § 114, enacts, that "a writ of view shall not be necessary or used; but whether the view is to be had by a common or special jury, it shall be sufficient to obtain a rule of the court or judge's order, directing the view to be had; and the proceedings upon the rule for a view shall be the same as the proceedings heretofore had under a writ of view; and the sheriff, upon request, shall deliver to either party the names of the viewers, and also shall return their names to the associate, for the purpose of their being called as jurymen upon the trial." See, also, 34 & 35 V., c. 65, § 38, Ir., as to the Irish practice; and Reg. Gen. 24 V., r. 75, 6 H. & N. xiii., as to the practice on the Revenue side of the Queen's Bench Division.

<sup>4</sup> Reg. Gen., H. T., 1853, r. 48. As to what the affidavit in support of the application must contain, and as to costs, see *id.*, r. 49, cited 1 E. & B. App. xi.

except in actions of a local nature; such as ejectment, trespass quare clausum fregit, waste, and nuisance; and Mr. Baron Parke even held that the enactment was inapplicable to a case, where an action was brought to recover the value of work done to the defendant's house, and the defence rested on the alleged bad quality of the work.<sup>1</sup> The construction thus put upon the Act proved very clearly that the Superior Courts possessed no adequate powers for ordering a view even in the case of a house; and the Common Law Commissioners were not slow to perceive, that in numerous other cases an inspection of chattels before trial, either by the party, his witnesses, or the jury, might be of great advantage,—as, for example, when the quality or construction of machinery, or the condition, value, or identity of goods was in dispute.<sup>2</sup> Accordingly, they recommended in their second Report, that the Superior Courts of Common Law should be intrusted with additional powers for ordering the inspection of premises and chattels, and their recommendation was carried out by § 58 of the Common Law Procedure Act, 1854.<sup>3</sup>

§ 560. As that section is now repealed,<sup>4</sup> it is needless here to set out its provisions; and the more so as the law on the subject is at present governed by the Rules of the Supreme Court, 1883, which in Ord. L. provide as follows :—

R. 3. "It shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the *detention, preservation or inspection of any property or thing*, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorise *any persons* to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

R. 4. "It shall be lawful for any *judge*, by whom any cause or

<sup>1</sup> *Stones v. Menhem*, 2 Ex. R. 382.

<sup>2</sup> 17 & 18 V., c. 125.

<sup>3</sup> 2d Rep. p. 37.

<sup>4</sup> 46 & 47 V., c. 49.

matter may be heard or tried with or without a jury, or before whom any cause or matter may be brought by way of appeal, to *inspect* any property or thing concerning which any question may arise therein."

R. 5. "The provisions of Rule 3 of this Order shall apply to *inspection by a jury*, and in such case the court or a judge may make all such orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury at such time and place, and in such manner as they or he may think fit."

R. 6 next provides, that an application for an order under R. 3 may be made to the court or a judge by any party. "If the application be by the plaintiff, it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application."

§ 561. The Irish Act of 16 & 17 V., c. 113, contains a clause, § 504A which, though quite sufficiently wordy, attains some of the objects aimed at by the English Rules; for § 47 provides, that "in any case in which it shall appear to the court or a judge, that it would be necessary, for the purpose of ascertaining the truth of any matter in dispute between the parties in the action, that an inspection or examination of any premises or chattels in the possession or power of either party, and in respect of which, or some right or injury connected with which, the said action shall be brought, should be had by the opposite party, his attorney, agent, witnesses, or by the jury, it shall be lawful for such court or judge to order that the party, in whose possession or power the same shall be, shall permit an inspection and examination of the said premises or chattels by the jury, or by such person or persons on behalf of the party applying, and at such times and under such regulations, as to the said court or judge shall seem fit." The Patents, Designs, and Trade Marks Act, 1883,<sup>1</sup> which extends equally to England and Ireland, recognises the same principle; and, under § 30 of that statute, either party may, in an action for the infringement of a

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<sup>1</sup> 46 & 47 V., c. 57.

(3371)

patent, obtain such an order for an inspection<sup>1</sup> as the court or a judge may think fit to grant.

§ 562. All these powers to order views of places or inspection of property, whether granted by statute or rule, give to the courts and judges, by implication, authority to order all things ancillary to the view or inspection required. Where, therefore, a wall had recently been erected in a mine, so as to obstruct a complete inspection of the workings, the court, on a question of encroachment, ordered the removal of such obstruction.<sup>2</sup>

§ 564. The Admiralty Court Act, 1861,<sup>3</sup> contains in § 18 an enactment on the same subject, which enables any party to apply to that Court "for an order for the inspection by the Trinity Masters or others appointed for the trial of the cause, or by the party himself or his witnesses, of any ship or other personal or real property, the inspection of which may be material to the issue of the cause; and the court may make such order in respect of the costs arising thereout as to it shall seem fit."<sup>4</sup>

§ 565. Under the Rules of the Supreme Court, 1883, "where any cause or matter, or any question in any cause or matter, is referred to a *Referee*, he may, subject to the order of the court or a judge," (among other things) "have any inspection or view, either by himself or with his assessors, if any, which he may deem expedient for the better disposal of the controversy before him."<sup>5</sup>

§ 566. These are admirable provisions so far as they extend, but as a question of policy it will scarcely admit of a doubt, that the power of granting a view, or inspection, which,—except in the special cases of County Courts,<sup>6</sup> Barmote Courts<sup>7</sup> and Courts-

<sup>1</sup> See *Vidi v. Smith*, 3 E. & B. 969, 974; *Patent Type Found. Co. v. Lloyd*, 5 H. & N. 192; *Patent Type Found. Co. v. Walter*. 1 V. John. 727.

<sup>2</sup> *Bennett v. Griffiths*, 3 E. & E. 467.

<sup>3</sup> 24 & 25 V., c. 10. See, also, 30 & 31 V., c. 114, § 66, *Ir.*

<sup>4</sup> See *The Germania*, 37 L. J., Adm. 59.

<sup>5</sup> Ord. XXXVI., R. 48.

<sup>6</sup> *Cy. Ct. Rules*, 1875, Ord. XI.

<sup>7</sup> See 14 & 15 V., c. 94, 1 Sch., §§ 22—28, and 2 Sch. Form.

martial,<sup>1</sup>—is at present confined, both in England and in Ireland, to the judges of the Supreme Court, and to proceedings in one or other of the Divisions of that Court, might with great advantage be extended to every court of record. It must also be borne in mind that, as the law now stands, the New Rules, cited in § 560, simply apply to civil proceedings in the Supreme Court,<sup>2</sup> and consequently, in all criminal proceedings, the practice respecting views still rests on the inadequate provisions of the Acts of 1825 and 1852.<sup>3</sup> It further deserves consideration, whether it be not expedient to empower the presiding judge at any trial to order a view, even *after the evidence may have been heard*,<sup>4</sup> if in his opinion such a step is necessary for the purposes of justice.

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<sup>1</sup> 44 & 45 V., c. 58, § 53, subs. 7.

<sup>2</sup> Rules of Sup. Ct., 1883, Ord. LXVIII., R. 1.

<sup>3</sup> 6 G. 4, c. 50, §§ 23 and 24; 15 & 16 V., c. 76, § 114, both cited ante, p. 501.

<sup>4</sup> In *R. v. Martin*, 1 Law Rep., C. C. 378; 12 Cox, 204; 41 L. J., M. C. 113, S. C.; the Court of Crim. Appeal is reported to have held, that the Deputy Assistant Judge for the Middlesex Sessions, on the trial of a misdemeanor, was empowered to allow the jury to have a view of the premises in question, after he had summed up the evidence to them. In this case, however, there was no argument heard, and the attention of the judges was not directed to any of the statutes on the subject.

## CHAPTER VII.

## HEARSAY.

§ 567.<sup>1</sup> As evidence afforded by our own senses is seldom at- § 507  
tainable in judicial trials, the law is satisfied with requiring the next best evidence, namely, the testimony of those who can speak from their own personal knowledge. It is not requisite that the witness should have personal knowledge of the main fact in controversy; for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying within his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be. For it is deemed indispensable to the proper administration of justice,—first, that every witness should give his testimony under the sanction of an oath, or its equivalent, a solemn affirmation,—and secondly, that he should be subject to the ordeal of a cross-examination by the party against whom he is called, so that it may appear, if necessary, what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. But testimony from the relation of third persons, even where the informant is known, cannot be subjected to these tests; for, as Mr. Justice Buller observes, “If the first speech were without oath, another oath that there was such speech makes it no more than a mere speaking, and so of no value in a court of justice;”<sup>2</sup> besides, it is often impossible to ascertain through whom, or how many persons, the narrative has been transmitted, from the original witness of the fact. It is this, which constitutes that sort of second-hand evidence, termed hearsay; a species of proof

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<sup>1</sup> Gr. Ev. § 98, in great part.

<sup>2</sup> B. N. P. 294, b.



which, with a few exceptions that will be presently noticed, cannot be received in judicial investigations.<sup>1</sup>

§ 568. This rule of exclusion has been recognised as a fundamental principle of the law of evidence ever since the time of Charles the Second;<sup>2</sup> and so strictly is it enforced that it is even held applicable to cases, in which, if the declaration be rejected, no other evidence can possibly be obtained; as, for example, where the declaration purports to be that of the only eye-witness of the transaction, and he is since dead.<sup>3</sup> So, it has several times been held, where prisoners have been indicted for ravishing children, who were too young to be admissible witnesses, that statements made by the children to their mothers shortly after the offence

<sup>1</sup> The rule excluding hearsay evidence, or rather the mode in which that rule is frequently misunderstood in courts of justice, is amusingly caricatured by Mr. Dickens in his report of the case of *Bardell v. Pickwick*, p. 367:—

“ ‘I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up if you please, Mr. Weller.’

“ ‘I mean to speak up, sir,’ replied Sam. ‘I am in the service o’ that ’ere gen’l’mán, an wery good service it is.’

“ ‘Little to do, and plenty to get, I suppose?’ said Serjeant Buzfuz, with jocularly.

“ ‘Oh quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes,’ replied Sam.

“ ‘You must not tell us what the soldier, or any other man, said, sir,’ interposed the judge, ‘it’s not evidence.’

“ ‘Wery good, my lord,’ replied Sam.”

<sup>2</sup> One of the earliest cases in which the rule was acted upon, is *Sampson v. Yardley*, 2 Keb. 223, Pl. 74, 19 Car. 2.

<sup>3</sup> 1 Ph. Ev. 209. In Scotland the rule is otherwise; evidence on the relation of others being admitted, where the relator is since dead, and would, if living, have been a competent witness.—1 Dickson, Ev. 66, 67; *Dysart Peer.*, L. R., 6 App. Cas. 489. In this last case the extent of the rule and the exceptions to which it is subject, are discussed at some length. It seems that even where the relation has been handed down to the witness at second hand, and through several successive relators, each only stating what he received from the intermediate relator, it will still be admissible, if the original and intermediate relators are all dead, and would have been competent witnesses if living. *Tait*, Ev. 430, 431; but see 1 Dickson, Ev. 70. The reason for receiving hearsay evidence in cases, where, as is often the case in Scotland, the judges determine upon the facts in dispute, as well as upon the law, is stated and vindicated by Sir J. Mansfield, in the *Berkeley Peer.*, 4 Camp 415. It is observable, that, according to the practice of the English courts, hearsay evidence is often admitted and acted upon in affidavits, which are submitted to the judges only.

was committed, could not be received in evidence.<sup>1</sup> So, also, a declaration, though made on oath, and in the course of a judicial proceeding, cannot be received, if the *litigating parties are not the same*; because, in such case, the party against whom the evidence is offered, has had no opportunity of cross-examining the declarant. The deposition therefore of a pauper as to the place of his settlement, taken *ex parte* before a magistrate, will be rejected, though the pauper himself has since absconded or died.<sup>2</sup>

§ 569. The rule will even exclude *declarations of a deceased* § 509 *subscribing witness* to a deed or will, in *disparagement* of the evidence afforded by his signature. In the case of *Stobart v. Dryden*,<sup>3</sup> the admissibility of such declarations was strenuously urged on two grounds; first, that since the party offering the deed used the declaration of the witness, as evidenced by his signature to prove the execution, the other party might well be permitted to use any other declaration of the same witness, to disprove it; and, secondly, that such declaration was in the nature of a substitute for the loss of the benefit of a cross-examination of the subscribing witness; by which either the fact confessed would have been proved, or the witness might have been contradicted, and his credit impeached. Both these grounds were overruled by the Court; the first, because the evidence of the handwriting in the attestation is not used as a declaration by the witness, but is offered merely to show the fact that he put his name there, in the manner in which attestations are usually placed to genuine signatures; and the second, chiefly because of the mischiefs which would ensue, if the general rule excluding hearsay were thus broken in upon. For the security of solemn instruments would thereby become much impaired, and the rights

<sup>1</sup> *R. v. Brasier*, 1 Lea. 199; 1 East, P. C. 443, S. C.; *R. v. Nicholas*, 2 C. & Kir. 246, per Pollock, C. B.

<sup>2</sup> *R. v. Nuneham Courtney*, 1 East, 373; *R. v. Ferry Frystone*, 2 East, 54; *R. v. Abergwilly*, id. 63; *Mima Queen v. Hepburn*, 7 Cranch, 296.

<sup>3</sup> 1 M. & W. 615, 623, 624, 627.

of parties under them would be liable to be affected at remote periods by loose declarations of the attesting witnesses, which could neither be explained, nor contradicted, by the testimony of the witnesses themselves. In admitting such declarations, too, there would be no reciprocity; for although the party impeaching the instrument would thereby have an equivalent for the loss of his power of cross-examination of the living witness, the other party would have none for the loss of his power of re-examination.

§ 570.<sup>1</sup> The term *hearsay* is used with reference to what is *done* § 510 or *written*, as well as to what is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person.<sup>2</sup> That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that it supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness,<sup>3</sup> its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practised with impunity under its cover, combine to support the rule that hearsay evidence is inadmissible.<sup>4</sup>

§ 571. It cannot, however, be denied, that the rule excluding § 511 hearsay evidence, though in general admirably calculated for trials before popular tribunals, may in many instances work considerable injustice. For example, on a question respecting the competency of a testator, the conduct of his family or relations taking the same precautions in his absence as if he were a lunatic, or his election in his absence to some high and responsible office, or the conduct of a physician who permitted him to execute a will,—all

<sup>1</sup> Gr. Ev. § 99, in great part.

<sup>2</sup> 1 Ph. Ev. 185.

<sup>3</sup> "Pluris est oculatus testis unus, quam auriti decem;

Qui audiunt, audita dicunt, vix vident, planè sciunt."

PLAUT. *Trucu*. Act 2, sc. 6, 1, 8, 9.

<sup>4</sup> Per Marshall, C. J., in *Mima Queen v. Hepburn*, 7 Cranch, 290, 295, 296; *Davis v. Wood*, 1 Wheat. 6, 8; R. v. *Eriswell*, 3 T. R. 707.

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these, when considered with reference to the matter in issue, are mere instances of hearsay evidence, mere statements, expressed in the language of conduct instead of the language of words; and, consequently, they are inadmissible in a court of justice, although in the ordinary transactions of life they would deservedly be considered as cogent moral proof.<sup>1</sup> So, on a question of seaworthiness, the fact that a deceased captain, after examining every part of the vessel, embarked in it with his family,—and, on a question respecting the loss of insured property, the fact that other underwriters have paid on the same policy,<sup>2</sup>—cannot be received in evidence. On the same ground the fact, that, after the issuing of a fiat, certain creditors of the bankrupt returned to his assignees goods which they had received from the bankrupt before he delivered other goods to the defendant, was, in an action of trover brought by the assignees, held inadmissible, as proof that an act of bankruptcy had been committed prior to the time when the goods came into the hands of the defendant;<sup>3</sup> and,—not to multiply instances,<sup>4</sup>—where a servant was indicted for perjury, in saying that her deceased mistress had never had a child, declarations of the mistress were rejected as evidence for the Crown,<sup>5</sup> although, in action of ejectment, where the same question was in issue, and the words charged as perjury were uttered, such evidence was admitted, as relating to a matter of pedigree.<sup>6</sup>

§ 572. In most of the instances given above, as illustrating the occasional inconvenience of the rule, the evidence rejected amounted to something more than the mere declarations of parties not examined on oath, nor subjected to cross-examination; for these *declarations were accompanied by acts* done in confirmation of their sincerity, and as such, the evidence was, morally speaking, entitled to great weight. The law, however, will not on this account allow

<sup>1</sup> Wright v. Doe d. Tatham, 7 A. & E. 388, per Parke, B.; 4 Bing. N. C. 54, per Vaughan, J.

<sup>2</sup> 7 A. & E. 387, 388.

<sup>3</sup> Backhouse v. Jones, 6 Bing. N. C. 65; 8 Scott, 148, S. C.

<sup>4</sup> See Gresham Hotel Co. v. Manning, 1 R., 1 C. L. 125.

<sup>5</sup> Heath's case, 18 How. St. Tr. 68, 76.

<sup>6</sup> Annesley v. D. of Anglesea, 17 How. St. Tr. 1175, 1188.

any exception to be made in favor of hearsay; for although, if an act done be evidence per se, any declarations accompanying that act are,—as we shall presently see,<sup>1</sup>—admissible for the purpose of illustrating, qualifying, or completing it; yet, if the act be in its own nature irrelevant to the issue, and the declaration be inadmissible, the union of the two cannot render them evidence.<sup>2</sup>

§ 573. This question was much discussed in the great case of *Doe. d. Tatham v. Wright*,<sup>3</sup> where the title to the property in dispute depended upon the competency of Mr. Marsden to make a will. The cause was tried four times, and as often debated in the Superior Courts, till at length in the House of Lords it was decided by all the judges, that letters addressed to a person, whose sanity is the fact in question, unless connected in evidence with some act done by him in relation thereto, are inadmissible to show that he was sane, though the writers were since dead, and the party addressed was treated in the letters as an intelligent man. A great majority of the learned judges also held upon that occasion, that the mere fact of finding such letters, many years after they were written, with the seals broken, in company with other papers bearing indorsements in the testator's handwriting, in a cupboard under his bookcase in his private room, was insufficient to raise an inference that they had been read, understood, or acted upon by him; since,—although letters, found in such a situation, would no doubt be evidence against a party criminally accused or civilly charged, because, on the tacit supposition that he was a man of sound mind, it would be presumed that he was cognizant of their contents;<sup>4</sup>—yet, to make such a supposition, where the capacity of the party was the matter in controversy, would be to argue in a circle. The reasoning, in fact, would proceed thus:—because the testator had sufficient ability to transact business, therefore the inference arises that he

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<sup>1</sup> Post, § 583, et seq.

<sup>2</sup> 7 A. & E. 361; 4 Bing. N. C. 498. See *Gresham Hotel Co. v. Manning*, I. R., 1 C. L. 125.

<sup>3</sup> See 2 Russ. & Myl. 1; 1 A. & E. 3; 3 N. & M. 260; 7 A. & E. 313; 6 N. & M. 132; 4 Bing. N. C. 489, S. C.

<sup>4</sup> See 7 A. & E. 369, per Gurney, B.; id. 376, per Bosanquet, J.; 4 Bing. N. C. 531. per Alderson, B.

read and understood the letters; and because he read and understood the letters, therefore the inference arises that he had sufficient ability to transact business.<sup>1</sup>

§ 574. Had the testator, in the case just put, indorsed these letters himself, or could any direct or positive evidence have been given to show that he had, whether by act, speech, or writing, manifested a knowledge of their contents, it is clear that the letters could not have been rejected, or in any way withdrawn from the consideration of the jury; for although they would then have been admitted solely on the technical ground that they explained and illustrated his conduct, no rule of law could have prevented them from operating with full effect upon the minds of the jury, as showing the unbiassed opinions of the writers, and in what manner the testator had been treated by them.<sup>2</sup> § 514

§ 575. When the ecclesiastical tribunals were courts of probate, they adopted a different rule from that established by the case of *Doe d. Tatham v. Wright*; and in questions respecting the mental capacity of a testator, they admitted, as evidence of *treatment*, letters written to him by his friends, without proof of any recognition on his part,<sup>3</sup>—and, as evidence of *opinion*, letters written by his relatives even to other parties.<sup>4</sup> These decisions, however, are now, it is feared, of no importance, as the Probate Division is bound § 515

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<sup>1</sup> See 7 A. & E. 391, per Parke, B.; 4 Bing. N. C. 545, per id.; id. 531, per Alderson, B.; id. 502, 504, per Coleridge, J.; id. 525, 526, per Patteson, J. The letters rejected in this case were three. 1st. A letter of gratitude to the testator from a clergyman to whom he had formerly given preferment; 2nd. A letter of friendship from a relative, with whom the testator was proved to have corresponded three years afterwards; 3rd. A letter advising the testator to direct his attorney to take steps in a transaction in a certain parish. This letter was indorsed by the attorney, who was long since deceased. Three of the judges considered that all the letters were admissible, six thought that the last was. The remaining judges, including Lds. Brougham, Lyndhurst, and Cottenham, held that all the letters were alike inadmissible.

<sup>2</sup> 7 A. & E. 325, per Ld. Denman; 4 Bing. N. C. 500, per Coleridge, J.; id. 530, per Alderson, B.; id. 510, per Williams, J.; id. 567, per Tindal, C. J.

<sup>3</sup> *Morgan v. Boys*, per Sir H. Jenner, cited 7 A. & E. 337; *Handley v. Jones*, cited id.; *Waters v. Howlett*, per Sir J. Nicholl, cited 1 A. & E. 8.

<sup>4</sup> *Wheeler v. Alderson*, 3 Hagg. Ec. R. 574, 609, per Sir J. Nicholl.

to recognise the rules of evidence observed in the other Divisions of the High Court.<sup>1</sup>

§ 576.<sup>2</sup> In considering this branch of the law of evidence, care must be taken to *distinguish* clearly between *hearsay evidence* and that which is deemed *original*. For it does not follow that, because the writings or words in question are those of a third person not under oath, they are therefore to be considered as hearsay. On the contrary, it often happens that the very fact in controversy is, whether certain things were written, or spoken, and *not* whether they were *true*; and at other times the oral or written statements tendered in evidence may prove to be the natural or inseparable concomitants of the principal fact in controversy.<sup>3</sup> In either of these cases it is obvious that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue. Thus, if the question be whether a party has acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence. This<sup>4</sup> is often illustrated in actions for malicious prosecution,<sup>5</sup> or libel;<sup>6</sup> as also in cases of agency and of trusts. For example, in an action for malicious prosecution, when the plaintiff,—in order to show that the magistrate's leniency in admitting him to bail had been occasioned, not by the intercession of the defendant, but by the receipt of a letter said to have come from a judge,—tendered such letter in evidence, it was held to be admissible, without proof that it was written by the judge's authority; and, in the same case, an affidavit sworn by a clerk of the prosecutor's solicitor, which stated that means had been taken on the part of the prosecutor to prevent a person from becoming bail for the plaintiff, was likewise admitted as original evidence, without the clerk's being

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<sup>1</sup> 20 & 21 V., c. 77, § 33; 20 & 21 V., c. 79, § 38, Ir.; Supr. Ct. of Jud. Act, 1873, 36 & 37 V., c. 66, § 16; Supr. Ct. of Jud. Act, 1875, 38 & 39 V., c. 77, § 18.

<sup>2</sup> Gr. Ev. § 100, in great part.

<sup>3</sup> *Bartlett v. Delprat*, 4 Mass. 702, 708; *Du Bost v. Beresford*, 2 Camp 512.

<sup>5</sup> *Ravenga v. Mackintosh*, 2 B. & C. 693.

<sup>6</sup> *Coleman v. Southwick*, 9 Johns. 45.

<sup>4</sup> Gr. Ev. § 101, in part.

called to prove by whose instructions he had made the affidavit.<sup>1</sup> So, the *replies* given to inquiries made at the residence, either of an absent witness, or of a bankrupt, denying that he was at home, are original evidence, without examining the persons to whom the inquiries were addressed; because the testimony of the parties inquiring is sufficient to establish the denial, which is the only material fact.<sup>2</sup>

§ 577.<sup>3</sup> Not only does this doctrine apply, whenever the fact that § 517 a certain communication was made, and not its truth or falsehood, is the point in controversy;<sup>4</sup> but it extends also to those cases, where the *truth* of the facts in dispute will be inferred from the *existence* of another fact which is under investigation. Upon these grounds it is considered that evidence of *general reputation, reputed ownership, public rumour, general character, general notoriety*, and the like, though composed of the speech of third persons not under oath, is original evidence and not hearsay; the immediate subject of inquiry being the concurrence of many voices, which raises a presumption that the fact in which they concur is true.<sup>5</sup>

§ 578. Thus, it has frequently been decided that, except in peti- § 517 tions for damages by reason of adultery, and in indictments for bigamy, where strict proof of marriage is required,<sup>6</sup> *general reputation* is admissible to establish the fact of parties being married. In most of the cases, the marriage has been proved by evidence of certain specific facts, such as the parties being received into society as man and wife, being visited by respectable families in the neigh-

<sup>1</sup> Taylor v. Willans, 2 B. & Ad. 845.

<sup>2</sup> Crosby v. Percy, 1 Taunt. 384; Key v. Shaw, 8 Bing. 320; Morgan v. Morgan, 9 id. 359; Sumner v. Williams, 5 Mass. 444; Pelletreau v. Jackson, 11 Wend. 110, 123, 124; Phelps v. Foot, 1 Conn. 387. Where it is necessary to show, not only that diligent search has been made for the witness, but that he is actually absent, such evidence is not admissible. See ante, §§ 475, 517.

<sup>3</sup> Gr. Ev. § 101, in part.

<sup>4</sup> Whitehead v. Scott, 1 M. & Rob. 2; Shott v. Strealfeld, id. 8.

<sup>5</sup> Foulkes v. Sellway, 3 Esp. 236; Jones v. Perry, 2 id. 482; B. N. P. 296, 297; Oliver v. Bartlett, 1 B. & B. 269; Gurr v. Rutton, Holt, N. P. R. 327.

<sup>6</sup> See ante, § 172.



bourhood, attending church and public places together, and otherwise demeaning themselves in public, and addressing each other, as persons actually married.<sup>1</sup> Still, though some of these circumstances are receivable, as amounting to acts of admission by the parties themselves, those, which are merely evidence of the *treatment* of the parties by third persons, cannot be admissible on any principle that would not equally include the *declarations* of strangers. The acts, like the words, merely show the opinion entertained by persons not called as witnesses; and though it may be said, that what a person does is usually better evidence of his opinion than what he says, yet this is an observation which goes rather to the weight than to the admissibility of the evidence. Accordingly, general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute,<sup>2</sup> will be receivable in proof of marriage; and in one case it was decided, after verdict, that the uncorroborated statement of a single witness, who did not appear to be related to the parties, or to live near them, or to know them intimately, but who asserted that he had *heard* they were married, was sufficient, *prima facie*, to warrant the jury in finding the marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof.<sup>3</sup>

§ 579. Upon somewhat similar grounds, it has been held, that, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness might be called to prove that several persons, who were not examined at the trial, had complained to him that they were alarmed at these meetings, and had requested him to send for military assistance;<sup>4</sup> and, on a question whether a libellous painting was

<sup>1</sup> *Kay v. Duchesse de Vienne*, 3 Camp. 123; *Hervey v. Hervey*, 2 W. Bl. 877; *Birt v. Barlow*, 1 Doug. 174; *Read v. Passer*, 1 Esp. 214; *Leader v. Barry*, id. 353; *Doe v. Fleming*, 4 Bing. 266; *Goodman v. Goodman*, 28 L. J., Ch. 1; *Smith v. Smith*, 1 Phillim. R. 294; *Hammick v. Bronson*, 5 Day, 290, 293; *In re Taylor*, 9 Paige, 6.

<sup>2</sup> *Lyle v. Ellwood*, 19 Law Rep., Eq. 98, per Hall, V.-C.; 44 L. J., Ch. 164, S. C.; *Collins v. Bishop*, 43 L. J., Ch. 31, per Malins, V.-C.

<sup>3</sup> *Evans v. Morgan*, 2 C. & J. 453.

<sup>4</sup> *R. v. Vincent*, 9 C. & P. 275; *Redford v. Birley*, 3 Stark. R. 88—91.

made to represent a certain individual, the declarations of spectators, while looking at the picture in the exhibition, have been admitted in evidence.<sup>1</sup>

§ 580.<sup>2</sup> Whenever the *bodily or mental feelings* of an individual § 512 are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence. And the question whether they were real, or feigned, is for the jury to determine. Thus, the representations by a *sick person* of the nature and effects of the *malady* under which he is labouring, are receivable as original evidence, whether they be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter, inasmuch as a physician is far more capable than a man unacquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statements.<sup>3</sup> This doctrine has been carried to such an extent that, in an action by the husband upon a policy of insurance on the life his wife, where the question related to the state of her health at the time when the policy was effected, a witness for the defendants was allowed to state the result of a conversation she had had with the deceased, shortly after the surgeon who was consulted in effecting the insurance had given a certificate of her health, in which conversation the deceased had expressed an apprehension that she should only live a few days, and had added that she had not been well from a time preceding her being examined by the surgeon. The court held that the conversation was admissible, notwithstanding the general rule which at that time excluded the declaration of a wife as against her husband;<sup>4</sup> and the more especially so, as the surgeon had been first called by the

<sup>1</sup> Du Bost v. Beresford, 2 Camp. 512, per Ld. Ellenborough.

<sup>2</sup> Gr. Ev. § 102, in part.

<sup>3</sup> Aveson v. Ld. Kinnaird, 6 East, 188; R. v. Blandy, 18 How. St. Tr. 1135—1138; Gardner's Peer., 79, per Copley, Att.-Gen.; Grey v. Young, 4 M.C. 31; Gilchrist v. Bale, 8 Watts, 355. See Witt v. Witt and Klindworth, 3 Swab. & Trist. 143, where Sir C. Cresswell rejected *letters* written by a patient to a medical man describing his symptoms. Sed qu.

<sup>4</sup> See, now, 16 & 17 V., c. 83.

plaintiff, and had admitted that he had formed his opinion respecting her health, principally from the satisfactory answers which she had given to his inquiries.<sup>1</sup>

§ 581. So, on a trial for murder by poisoning, statements made § 519 by the deceased in conversation shortly before he took the poison, have been received in evidence for the purpose of proving the state of his health at that time;<sup>2</sup> and, on the same ground, it has frequently been held, in actions or indictments for assault, that what a man has said about himself to his surgeon was evidence to show what he suffered by reason of the assault.<sup>3</sup> So, on an indictment for highway robbery, the fact that the prosecutor, a few hours after the attack made upon him, complained to a constable that he had been robbed, will perhaps be admissible; though the witness cannot be further asked whether, on making the complaint, the prosecutor mentioned the name of the prisoner.<sup>4</sup> It would seem, also, that, in prosecutions for rape, proof that the woman shortly after the injury complained that a dreadful outrage had been perpetrated upon her, would in the event of her death, be receivable as independent evidence;<sup>5</sup> and if the prosecutrix were called as a witness, such complaints would a fortiori be admissible as tending to confirm her credit.<sup>6</sup> In no case, however, can the *particulars* of the complaint be disclosed by witnesses for the Crown, either as original, or as confirmatory evidence, but the details of the statement can only be elicited by the prisoner's

<sup>1</sup> *Aveson v. Ld. Kinnaird*, 6 East, 188.

<sup>2</sup> *R. v. Johnson*, 2 C. & Kir. 354, per Alderson, B.; *R. v. Blandy*, 18 How. St. Tr. 1135—1138.

<sup>3</sup> *Aveson v. Ld. Kinnaird*, 6 East, 198, per Lawrence, J.; *R. v. Guttridge*, 9 C. & P. 472, per Parke, B.

<sup>4</sup> *R. v. Wink*, 6 C. & P. 397; commented upon by Cresswell, J., in *R. v. Osborne, C. & Marsh*, 624.

<sup>5</sup> *R. v. Megson*, 9 C. & P. 420, per Rolfe, B.; *R. v. Osborne, C. & Marsh*, 624, per Cresswell, J.; *R. v. Lunny*, 6 Cox, 446, per Monahan, C. J. In *R. v. Guttridge*, 9 C. & P. 471, where a prosecutrix for a rape was absent from the trial, Parke, B., rejected proof of her complaint, apparently on the ground that it was only confirmatory evidence.

<sup>6</sup> *R. v. Megson*, 9 C. & P. 420; *R. v. Clarke*, 2 Stark. R. 241; 1 East, P. C. 444, 445; 1 Hale, 633; *R. v. Wood*, 14 Cox, 46, per Bramwell, L. J.

council on cross-examination.<sup>1</sup> It is difficult to see upon what principle this rule is founded, where the complaint is offered as confirmatory evidence; because, if witnesses were permitted to relate all that the prosecutrix had said in making her original complaint, such evidence would furnish the best test of the accuracy of her recollection, when she was sworn to describe the same circumstances at the trial.<sup>2</sup>

§ 592. Again, in petitions for damages on the ground of adultery,<sup>3</sup> if it be material, with the view of increasing or diminishing the damages, to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence.<sup>4</sup> But, to guard against the abuse of this rule, it must be proved by some evidence independent of the date appearing on the face of the letters,<sup>5</sup> that they were written by the wife to the husband prior to any suspicion of misconduct on her part, and when, consequently, no grounds existed for imputing collusion.<sup>6</sup> It is not, however, necessary, in the absence of other suspicious circumstances, to explain why the husband and wife were living apart at the time when the letters were written,<sup>7</sup> though of course it is expedient that such explanation should, if possible, be given.

<sup>1</sup> *R. v. Walker*, 2 M. & Rob. 212, per Parke, B.; *R. v. Osborne*, C. & Marsh. 622; *R. v. Quigley*, Ir. Cir. R. 677, per Torrens, J. But see *R. v. Wood*, 14 Cox, 46, per Bramwell, L. J.

<sup>2</sup> See *R. v. Walker*, 2 M. & Rob. 212.

<sup>3</sup> See 20 & 21 V., c. 85, § 33.

<sup>4</sup> *Trelawney v. Coleman*, 2 Stark. R. 191; 1 B. & A. 90, S. C.; *Willis v. Bernard*, 8 Bing. 376; *Winter v. Wroot*, 1 M. & Rob. 404, per Ld. Lyndhurst; *Gilchrist v. Bale*, 8 Watts, 355.

<sup>5</sup> *Trelawney v. Coleman*, 2 Stark. R. 193, per Holroyd, J.; *Houlston v. Smyth*, 2 C. & P. 24, per Best, C. J. This last case was an action for board and lodging supplied to a wife, while living separate from her husband in consequence of his cruelty; and letters, purporting to be written by the wife, were tendered by the husband to rebut this charge, but were rejected on the ground that no proof was given, beyond their date, of the time when they were sent. See ante, § 170.

<sup>6</sup> *Edwards v. Crock*, 4 Esp. 39, per Ld. Kenyon; *Trelawney v. Coleman*, 1 B. & A. 90; *Wilton v. Webster*, 7 C. & P. 198, per Coleridge, J. See *Wyndham's Divorce Bill*, 3 Macq. Sc. Ca., H. of L. 54.

<sup>7</sup> *Trelawney v. Coleman*, 2 Stark. 181; 1 B. & A. 90, S. C.

§ 583.<sup>1</sup> Certain *other declarations and acts* are admitted as original evidence, being distinguished from hearsay by their connexion with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. These surrounding circumstances may always be shown to the jury along with the principal fact, provided they constitute parts of what are termed the *res gestæ*; and whether they do so or not must in each particular case be determined by the judge in the exercise of his sound discretion, according to the degree of relationship which they bear to that fact.<sup>2</sup> Thus, on the trial of Lord George Gordon for treason, the cry of the mob, who accompanied the prisoner on his enterprise, was received in evidence, as forming part of the *res gestæ*, and showing the character of the principal fact.<sup>3</sup> So, on an indictment for manslaughter, a statement, made by the deceased immediately after he was knocked down, as to how the accident happened, has been held admissible;<sup>4</sup> and similar evidence has been received by Lord Holt in an action brought by a husband and wife against a defendant for wounding the wife.<sup>5</sup>

§ 584. So, also, where a person enters upon land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin,<sup>6</sup> or the like; or changes his actual residence, or domicile,<sup>7</sup> or is upon a journey, or leaves his home, or returns thither, or remains

<sup>1</sup> Gr. Ev. § 108, in great part.

<sup>2</sup> Per Parke, J., in *Rawson v. Haigh*, 2 Bing. 104; *Ridley v. Gyde*, 9 Bing. 349, 352; *Pool v. Bridges*, 4 Pick. 379; *Allen v. Duncan*, 11 Pick. 309.

<sup>3</sup> 21 How. St. Tr. 514, 529.

<sup>4</sup> *R. v. Foster*, 6 C. & P. 325, per Park and Patteson, Js., and Gurney, B. This case has been questioned by Cockburn, C. J., in *R. v. Bedingfield*, 14 Cox, 341, and in a subsequent pamphlet on the subject which was published by his lordship. Sed qu.; and see the author's letter to the Chief Justice in reply to the pamphlet, published by Messrs. Maxwell in 1880.

<sup>5</sup> *Thompson v. Trevanion*, Skin. 402.

<sup>6</sup> Co. Lit. 49 b, 245 b; *Robison v. Swett*, 3 Greenl. 316; 3 Bl. Com. 174, 175.

<sup>7</sup> *Brodie v. Brodie*, 2 Swab. & Trist. 259.

abroad, or secretes himself; or, in fine, does, or suffers, any other act material to be understood;<sup>1</sup> his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts.<sup>2</sup> So, upon an inquiry as to the state of mind, sentiments, intentions, or opinions of a person at any particular period, his contemporaneous declarations are admissible as parts of the *res gestæ*,<sup>3</sup> though evidence of this nature is seldom entitled to much weight.<sup>4</sup> Again, in a suit for enticing away a servant, his statement at the time of leaving his master will be received, as tending to show the motive of his departure;<sup>5</sup> and where an action of trover was brought against the assignees of a bankrupt, and it appeared that the plaintiff, at the recommendation of the bankrupt, had sent some goods to a dyer, and had told him that the bankrupt would call and give directions about them, it was held that these directions should have been submitted to the jury on behalf of the assignees, as affording some evidence of a dealing with the goods, if not of the consent of the true owner to such dealing.<sup>6</sup>

§ 585. So extensive is this rule in its operation, that to a <sup>§ 522</sup> certain degree it even overrides the general provision of law, which precludes a party's declarations from being evidence for

<sup>1</sup> *Parrott v. Watts*, 47 L. J., C. P. 79.

<sup>2</sup> *Bateman v. Bailey*, 5 T. R. 512, and the observations of Mr. Evans upon it, in 2 Poth., Obl., App. No. xvi., § 11; *Rawson v. Haigh*, 2 Bing. 99; 9 Moore, 217, S. C.; *Vacher v. Cocks*, M. & M. 353, per *Ld. Tenterden*; *Smith v. Cramer*, 1 Bing. N. C. 585; *Doe v. Arkwright*, 5 C. & P. 575, per *Parke, B.*; *Lord v. Colvin*, 4 Drew. 366; *Gorham v. Canton*, 5 Greenl. 266; *Thorndike v. City of Boston*, 1 Metc. 242; *Lund v. Tyngsborough*, 9 Cush. 37, 43. In *R. v. Edwards*, 12 Cox, 230, *Quain, J.*, carried the law to its extreme limit, for, on a trial of wife murder, he allowed a witness to state what the wife had said about her husband a week before her death, on bringing to the cottage of the witness an axe and carving knife to be taken care of. *Sed qu. as to this case.*

<sup>3</sup> *Barthelemy v. The People, &c.*, 2 Hill, N. Y. Rep. 248, 257.

<sup>4</sup> *Hodgson v. De Beauchesne*, 12 Moo. P. C. R. 325, per *Dr. Lushington*, cited with approbation by *Jessel, M. R.*, in *Doucet v. Geoghegan*, L. R., 9 Ch. D. 455; *Haldane v. Eckford*, L. R., 8 Eq. 631, per *James, Ld. J.*; and *Doucet v. Geoghegan*, L. R., 9 Ch. D. 457, per *id.*

<sup>5</sup> *Hadley v. Carter*, 8 New Hamps. 40. See, however, *R. v. Wainwright*, 13 Cox, 171, per *Cockburn, C. J.*, and *R. v. Pook*, *id.* 172, note, per *Bovill, C. J.*, et qu.

<sup>6</sup> *Sharp v. Newsholme*, 5 Bing. N. C. 713.

himself; and, therefore, in an action for falsely representing the solvency of a stranger, whereby the plaintiffs were induced to trust him with goods, statements by them at the time when the goods were supplied, that they trusted him in consequence of the representation, were received as evidence on their behalf;<sup>1</sup> and where a bailee was sued for loss by negligence, his declarations, contemporaneous with the loss, have been held in America to be admissible in his favour, as tending to show the nature of the loss.<sup>2</sup> In Lord George Gordon's trial, his counsel strove to carry this doctrine one step further; and witnesses having been called by the Crown to speak to a meeting that was held on the 29th of May, and to what fell from the defendant on that occasion, one of them was asked on cross-examination, what Lord George had said on the preceding night relative to the meeting, the object being to show thereby that his motives in convening and attending it were not criminal. The court, however, held that though the witness might be questioned as to the whole conversation that passed at the meeting, the private declaration of the defendant, whether subsequent or precedent to that meeting, could not be given in evidence as explanatory of his intentions or conduct.<sup>3</sup>

§ 586. In the practical application of this rule, two points deserve especial attention. The first is, that declarations,—though admissible as evidence of the declarant's *knowledge or belief* of the facts to which they relate, and of his *intentions* respecting them,—are *no proof* of the *facts* themselves; and, therefore, if it be necessary to show the existence of such facts, proof aliunde must be laid before the jury; and it seems that, in strict practice, this proof should be given in the first instance, before the court be called upon to receive evidence of the declarations. For example, the fact of insolvency must be established, before statements of the insolvent will be admitted to show that he was aware of his embarrassed circumstances.<sup>4</sup> Sometimes, under the law

<sup>1</sup> *Fellowes v. Williamson*, M. & M. 306, per Ld. Tenterden. See, also, *Milne v. Leisler*, 31 L. J., Ex. 257; 7 H. & N. 786, S. C.

<sup>2</sup> *Story*, Bail. § 339; citing *Tomkins v. Saltmarsh*, 14 Serg. & R. 275; *Beardslee v. Richardson*, 11 Wend. 25.

<sup>3</sup> 21 How. St. Tr. 542, 543.

<sup>4</sup> *Thomas v. Connell*, 4 M. & W. 267, 269, 270; *Craven v. Halliley*, cited *id.* 270, per Parke, B.; *Vacher v. Cocks*, M. & M. 353.

relating to bankrupts, the truth of the facts need not be proved, but it will suffice to show the bankrupt's belief. Thus, if the act of bankruptcy relied upon be an absconding with intent to delay creditors, a declaration by the bankrupt that he left home to avoid a writ will be admissible, though no evidence be given that any writ was actually out against him, because, in order to constitute this act of bankruptcy, neither writ nor pressure is in fact necessary.<sup>1</sup> Still, even in this case, the departure from home is a substantive act, which must be proved by evidence independent of the declaration; and being an act in itself equivocal, the statement of the bankrupt, made during its continuance, is admissible to show the intention with which it was done.<sup>2</sup>

§ 587. The second point deserving consideration is, that, although acts, by whomsoever done, are *res gestæ*, if relevant to the matter in issue,<sup>3</sup> yet if they be *irrelevant*, declarations qualifying or explaining them will, together with the acts themselves, be rejected. Thus, in an action against a town for injuries sustained through a defect in a highway, the declarations of a surgeon, since deceased, which were made at the time of his examining the plaintiff's wounds, have been rejected as evidence of the nature and extent of the injuries; for, in such a case as this, the fact of the surgical examination would itself have been immaterial, and the declarations were no more than the mere hearsay expression of a professional opinion.<sup>4</sup> On the non attention to this rule was founded one of the main fallacies in *Wright v. Doe d. Tatham*. There, on an issue respecting the sanity of a testator, letters written to him, and found among his papers after his death, were offered in evidence; and it was contended that the writing of a letter was an act done, that the contents of the letter were declarations accompanying that act, and that an opinion, though not evidence per se, was yet evidence when embodied in an act. To this it was answered by Mr. Justice Coltman, that, if the

<sup>1</sup> *Rouch v. Gt. West. Ry. Co.*, 1 Q. B. 51, 62, 63; 4 P. & D. 686, S. C.; *Newman v. Stretch*, M. & M. 338, per Parke, J.; *Ex parte Bamford*, 15 Ves. 449; *Robson v. Rolls*, 9 Bing. 448.

<sup>2</sup> *Rouch v. Gt. West. Ry. Co.*, 1 Q. B. 63.

<sup>3</sup> *Wright v. Doe d. Tatham*, 7 A. & E. 355, per Parke, B.

<sup>4</sup> *Lund v. Tyngsborough*, 9 Cush. 37.



letter was admissible on this ground, it must be either because the act done is evidence by itself, or because the opinion was evidence. Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act. But where the act is in its own nature irrelevant to the issue, and where the declaration *per se* cannot be received, no case has yet established that the union of the two will render them admissible.<sup>1</sup>

§ 588. In all these cases the principal points of attention are, § 525 whether the *circumstances and declarations* offered in proof were so connected with the main fact under consideration, as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. It was at one time thought necessary that they should be *contemporaneous* with it;<sup>2</sup> but this doctrine has of late years been rejected, and it seems now to be decided, that, although concurrence of time must always be considered as material evidence to show the connexion, it is by no means essential.<sup>3</sup> Thus, what a bankrupt said immediately on his return home, as to the place where he had been, and his motive in going, has been held admissible;<sup>4</sup> and in *Ridley v. Gyde*,<sup>5</sup> where the disputed act of bankruptcy was a fraudulent transfer, a declaration by the bankrupt, in which he gave a false account of the matter, was received in evidence, though made nearly a month after the transfer had taken place. In that case, the creditor, with whom the conversation was held, had pressed for payment of his debt immediately before the transfer, and had been promised security for the following day; but, instead of

<sup>1</sup> *Wright v. Doe d. Tatham*, 7 A. & E. 361, ante, § 572.

<sup>2</sup> This seems still to be the law in America. Thus, in *Enos v. Tuttle*, 3 Conn. R. 250, Hosmer, C. J., observed, that declarations, to become part of the *res gestæ*, "must have been made at the time of the act done, which they are supposed to characterise, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonise with them, as obviously to constitute one transaction."

<sup>3</sup> *Rouch v. Gt. West. Ry. Co.*, 1 Q. B. 60, 61; 4 P. & D. 686, S. C.

<sup>4</sup> *Bateman v. Bailey*, 5 T. R. 512; recognised by the Court in *Rouch v. Gt. West. Ry. Co.*, 1 Q. B. 61.

<sup>5</sup> 9 Bing. 349; 2 M. & Sc. 448, S. C. In this case, Gaselee, J., differed from the rest of the court, but the opinion of the majority was confirmed and recognised in *Rouch v. Gt. West. Ry. Co.*, 1 Q. B. 61.

keeping his word, the bankrupt had transferred his property to a relative, and had absconded. Under these circumstances the court, considering that the statement was a mere resumption of the conversation which was had at the first interview, adopted the rule which Mr. Justice Park had laid down in *Rawson v. Haigh*,<sup>1</sup> "that it is impossible to tie down to time the rule as to the declarations," and that, if connecting circumstances exist, a declaration may, even at a month's interval, form part of the whole *res gestæ*. So, where a trader had absented himself from home during the latter half of February and the commencement of March, two letters written by him on the 18th of January, in which he had asked for time on some bills of exchange payable in February, were admitted in evidence, as tending to throw light on the cause of his absence.<sup>2</sup>

§ 589.<sup>3</sup> Still, an act cannot be varied, qualified, or explained, § 526 either by a declaration which amounts to no more than a mere *narrative of a past occurrence*, or by an *isolated* conversation held, or an isolated act done, at a later period.<sup>4</sup> Thus, the schedule of an insolvent, delivered four months after his execution of a deed of assignment, has been rejected, when tendered by the assignees as evidence that the indenture was executed with intent to petition;<sup>5</sup> and where a creditor called upon a bankrupt in the morning, and being told that he was out, paid a second visit in the evening of the same day, when the bankrupt made a statement respecting his absence in the morning, Mr. Baron Parke held that this statement was inadmissible, for the purpose of showing that the bankrupt had intentionally denied himself to his creditors, it being too remote in point of time from the absence which it purposed to explain.<sup>6</sup> This last case can scarcely be reconciled with *Bateman v. Bailey*,<sup>7</sup> and possibly it would now be considered as laying down the rule somewhat too strictly; but whatever may

<sup>1</sup> 2 Bing. 104; 9 Moore, 217. S. C.

<sup>2</sup> *Smith v. Cramer*, 1 Bing. N. C. 585; 1 Scott, 541, S. C.

<sup>3</sup> Gr. Ev. § 110, slightly.

<sup>4</sup> *Hyde v. Palmer*, 3 B. & S. 657; 32 L. J., Q. B. 126, S. C.

<sup>5</sup> *Peacock v. Harris*, 5 A. & E. 449, 454.

<sup>6</sup> *Lees v. Marton*, 1 M. & Rob. 210.

<sup>7</sup> 5 T. R. 512, cited ante, § 588, n. 4.

be the precise limits of the rule,—if any can be assigned,—it is perfectly clear that declarations made, or letters written, during absence from home, explanatory of the motive of departure, are admissible as original evidence, since the departure and absence are very properly regarded as one continuing act.<sup>1</sup>

§ 590.<sup>2</sup> The same principles apply to the *acts* and *declarations* § 527 of one of a company of *conspirators*, in regard to the common design as affecting his fellows. Here, a foundation should first be laid by proof, sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or, at least, proper to be laid before the jury, as tending to establish such fact. The connexion of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them.<sup>3</sup>

§ 591. Sometimes, for the sake of convenience, the acts or § 528 declarations of one are admitted in evidence before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this mode of proceeding rests in the discretion of the judge, and in seditious or other general conspiracies is seldom permitted, except under particular and urgent circumstances; for, otherwise, the jury might be misled to infer the fact itself of the conspiracy from the

<sup>1</sup> *Rouch v. Gt. West. Ry. Co.*, 1 Q. B. 51, 61; 4 P. & D. 686, S. C.; *Rawson v. Haigh*, 2 Bing. 99, 104; 9 Moore, 217, S. C.

<sup>2</sup> Gr. Ev. § 111, in great part

<sup>3</sup> *R. v. Stone*, 6 T. R. 528, 529; 25 How. St. Tr. 1267, 1277, 1313, S. C.; *American Fur Co. v. U. S.*, 2 Pet. 358, 365; *Crowninshield's case*, 10 Pick. 497; *U. S. v. Gooding*, 12 Wheat. 469; *Com. v. Eberle*, 3 Serg. & R. 9. In *R. v. McKenna*, Ir. Cir. Rep. 461, Pennesfather, C. J., thus laid down the law:—"It is necessary to prove the existence of a conspiracy, and to connect the prisoner with it in the first instance, where you seek to give in evidence against him in the declaration of a co-conspirator; and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may, as in any other offence, prove the whole case against him by his own admissions."

declarations of strangers. Still, as a conspiracy need not be established by proof which actually brings the parties together, but may be shown, like any other fact, by circumstantial evidence, the detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession relative to the main design, will sometimes from necessity be admitted, as steps to establish the conspiracy itself. On this subject it is difficult to establish a general inflexible rule, but each case must, in some measure, be governed by its own peculiar circumstances.<sup>1</sup>

§ 502.<sup>2</sup> It makes no difference at what *time* the party accused is proved to have entered into the conspiracy or combination; because every one, who agrees with others to effect a common illegal purpose, is generally considered in law as a party to every act, which either had before been done, or may afterwards be done, by the confederates, in furtherance of the common design.<sup>3</sup> One or two individuals may have concocted the scheme, but all who afterwards join in carrying it out are equally guilty with the originators; <sup>4</sup> at least, if any evidence be forthcoming from which their adoption of the previous acts of the association can reasonably be inferred.<sup>5</sup> Neither does it matter whether the acts were done, or the declaration made, in the *presence* or in the *absence* of the accused, but everything said or done by any one of the conspirators or accomplices in furtherance of the common object, is evidence against each and all of the parties concerned, whether they were present or absent, and whether or not they were individually aware of what was taking place.<sup>6</sup> Thus, the cries of a mob, with whose proceedings the prisoner is connected, though made in his absence, are admissible against him, as explanatory of the objects which he, in common with the multitude, had in view; <sup>7</sup> and

<sup>1</sup> See *R. v. Blake*, 6 Q. B. 126; *Ford v. Elliot*, 4 Ex. R. 78.

<sup>2</sup> Gr. Ev. § 111, in part.

<sup>3</sup> *R. v. Watson*, 32 How. St. Tr. 7, per Bayley, J.

<sup>4</sup> *R. v. Murphy*, 8 C. & P. 311, per Coleridge, J.

<sup>5</sup> *R. v. O'Connell*, Arm. & T. 813, 814, per Pennefather, C. J.

<sup>6</sup> *R. v. Brandreth*, 32 How. St. Tr. 857, 858.

<sup>7</sup> *R. v. Ld. Geo. Gordon*, 21 How. St. Tr. 535, 536; cited by Buller, J., in *R. v. Hardy*, 24 How. St. Tr. 452. See *R. v. Petcherini*, 7 Cox, 79.

expressions used by persons going to a meeting convened by the defendant, are receivable on similar grounds.<sup>1</sup> In O'Connell's case, where the defendants were charged with summoning monster meetings for illegal purposes, papers publicly sold at these meetings, and supporting the views of the defendants, were received in evidence, though no proof was given connecting the defendants with the persons selling the papers.<sup>2</sup>

§ 593. Care, however, must be taken to distinguish between § 530 declarations, which are either acts in themselves purporting to advance the objects of the criminal enterprise, or which accompany and explain such acts, and those statements, whether written or oral, which, although made during the continuance of the plot, are in fact a *mere narrative* of the measures that have already been taken. These last statements are, as before explained,<sup>3</sup> inadmissible. The distinction here referred to may be well illustrated by the case of Hardy, who was prosecuted for high treason. There, a letter, written by a co-conspirator to a private friend unconnected with the plot, which gave an account of the proceedings of a society to which the writer and the defendant were proved to have belonged, and which enclosed several seditious songs stated to have been composed by the writer, and sung by him at a meeting of the society, was rejected on the ground that it was not a transaction in support of the conspiracy, but merely a relation of the part which the writer had taken in the plot, and, as such, only admissible against himself.<sup>4</sup> A second letter was then offered in evidence, which was written by another co-conspirator to a delegate in the country, describing the events that had occurred in London, and encouraging him thereby to proceed in the criminal business in which he was engaged; and as this letter was considered by the court as an act done in furtherance of the

<sup>1</sup> R. v. Hunt, 3 B. & A. 574; Redford v. Birley, 3 Stark. R. 85—88.

<sup>2</sup> Arm. & T. 275—277.

<sup>3</sup> Ante, § 589.

<sup>4</sup> 24 How. St. Tr. 451—453, per Eyre, C. J., Macdonald, C. B., and Hotham, B.; Buller and Grose, Js., diss. In R. v. Watson, 32 How. St. Tr. 352, Ld. Ellenborough observed that there was great weight in the arguments of Buller and Grose, Js.

plot, it was received against the defendant, though no evidence was given to show that it had ever reached the person for whose perusal it was intended.<sup>1</sup>

§ 594. The same distinction was drawn by the court in the case of *R. v. Blake*,<sup>2</sup> where the accused was indicted for conspiring with one Tye and others to defraud her Majesty of certain duties of customs. It appeared at the trial that Blake was a landing waiter, and Tye an agent for importers, at the custom-house; and it was the duty of these persons respectively to make entries of the contents of cases imported, so as to be a check upon each other. It was shown that on thirteen occasions they had made false entries, in which they stated that certain packages contained smaller quantities than was really the fact. It was then proposed to put in evidence Tye's day-book, which contained entries in his handwriting relative to the thirteen transactions, and showed the amount of duty actually paid by him. This book was found in Tye's counting-house, and the court held that it was clearly admissible, as containing entries made in furtherance of the conspiracy. Tye's cheque-book was next produced, for the purpose of showing by the counterfoil that Blake had received from him part of the moneys of which the customs had been defrauded in these transactions; but the court rejected this evidence, on the ground that it was no act done in pursuance of the plot, but was a mere statement as to the mode of distributing the plunder, *after* the fraud had been completed. Again, a conversation between two men, apparently *returning from a meeting*, which had been held within an hour before, and about half a mile distant from the spot where the men were, has been rejected, though offered as evidence, not only of the general nature of the meeting, but of the effect that was likely to be produced by the language there employed.<sup>3</sup> In fine, the declarations of a conspirator or accomplice are receivable against his fellows, only when they are in themselves acts, or when

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<sup>1</sup> 24 How. St. Tr. 473—477, per Macdonald, C. B., Hotham, B., Buller and Grose, Js.; Eyre, C. J., dubit.

<sup>2</sup> 6 Q. B. 126.

<sup>3</sup> *R. v. O'Connell*, Arm. & T. 257—259. See, also, *R. v. Murphy*, 8 C. & P. 305; *R. v. Watson*, 2 Stark. R. 141; 32 How. St. Tr. 349, 351, S. C.

they accompany and explain acts, for which the others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions.

§ 595. On a somewhat similar principle, papers found, after the apprehension of a prisoner, on the person or at the lodgings of a co-conspirator, will be admissible or not against the accused, according as there is or is not evidence to show that they existed before he was taken into custody. If no such evidence can be given, the papers will be rejected, as the prisoner cannot be responsible for acts or writings, which possibly may not have existed until after the common enterprise was, so far as he was concerned, at an end;<sup>1</sup> but if the previous existence of the papers be established, either by direct proof, or by strong presumptive evidence, the objection to their admissibility can no longer prevail.<sup>2</sup>

§ 596. The question how far *unpublished writings upon abstract subjects*, which, though of a kindred nature with the crime charged, have no direct relation to it, are admissible in evidence, may admit of some doubt. In the case of Algernon Sidney, a treatise containing speculative republican doctrines, which not only was unpublished and unconnected with the treasonable practices of which he was accused, but which appeared to have been composed several years before the trial, was, under the auspices of Judge Jefferies, admitted in evidence;<sup>3</sup> but subsequent times have regarded this trial as a judicial murder, and such proof would assuredly be rejected at the present day. If, indeed, the papers were closely connected with the nature and object of the alleged crime, they would probably, though unpublished, be considered in strict law admissible, without any positive proof that they were intended to be used in furtherance of the design; and if such

<sup>1</sup> R. v. Hardy, 24 How. St. Tr. 718, 731.

<sup>2</sup> R. v. Watson, 32 id. 337—342, 347—350; 2 Stark. R. 140, 141, S. C. See R. v. M'Cafferty, I. R., 1 C. L. 363. There, acts of insurrection committed after the arrest of the prisoner, but in consequence of instructions given by him before he was apprehended, were held to be admissible in evidence on a charge of conspiracy to raise rebellion.

<sup>3</sup> 9 How. St. Tr. 854—859; observed upon by Abbott, J., in R. v. Watson, 2 Stark. R. 147; and in Fost. C. L. 198.

proof could be given, they would doubtless be received.<sup>1</sup> Where conversations of co-conspirators or accomplices are proved, the effect of the evidence will of course depend upon the surrounding circumstances, such as the fact and degree of the prisoner's attention to what was said, and his approval or disapproval thereof.<sup>2</sup>

§ 597. The *declarations* of *co-trespassers* in civil actions are § 534 governed by the same rules; that is, if several are jointly sued, the declarations of each, which constitute parts of the *res gestæ*, are admissible against all;<sup>3</sup> while those which amount to mere admissions, or narratives of past events, can only be received against the party making them.<sup>4</sup> In one case,<sup>5</sup> which was an action for false imprisonment, Mr. Baron Garrow admitted the declarations of co-defendant, showing personal malice, as evidence against the other defendants, though made in their absence, and several weeks after the act complained of; but the attention of the learned judge does not appear to have been drawn to the *time* when the words were spoken, and probably this case would not now be regarded as a safe precedent. Where no common object or motive is imputed, as in actions for negligence, the declaration of each defendant is admissible against himself alone.<sup>6</sup>

§ 598.<sup>7</sup> This doctrine extends to all cases of *partnership*. When- § 535 ever any number of persons are associated together in the joint prosecution of a common enterprise or design, as in commercial partnerships, and similar cases, the act or declaration of each member, in furtherance of the common object of the association, is the act or declaration of all. By the very act of association each partner is constituted the agent of the others, for all purposes

<sup>1</sup> *R. v. Watson*, 32 How. St. Tr. 354—361; 2 Stark. R. 141, S. C.

<sup>2</sup> *R. v. Hardy*, 24 id. 703, per Eyre, C. J.

<sup>3</sup> See *R. v. Hardwick*, 11 East, 585, per Ld. Ellenborough; *Powell v. Hodgetts*, 2 C. & P. 432, per Garrow, B.; *North v. Miles*, 1 Camp. 389, per Ld. Ellenborough; *Bowsher v. Calley*, id. 391, n. per id.; 1 Ph. Ev. 204.

<sup>4</sup> *Daniels v. Potter*, M. & M. 501, per Tindal, C. J.

<sup>5</sup> *Wright v. Court*, 2 C. & P. 232.

<sup>6</sup> *Daniels v. Potter*, M. & M. 503, per Tindal, C. J.

<sup>7</sup> Gr. Ev. § 112, in part.



within the scope of the partnership concern;<sup>1</sup> unless, under the special circumstances of the case, an intention can be inferred by the jury, that a particular act should not be binding without the direct concurrence of each individual partner.<sup>2</sup> While the firm thus created exists, it speaks and acts only by the several members; but when that existence ceases by dissolution, the subsequent acts of the individual members are binding on themselves alone,<sup>3</sup> except so far as may have been otherwise agreed upon by the articles of association or dissolution,<sup>4</sup> or as the acts relate to the previous business of the firm.<sup>5</sup> This last exception may be illustrated by the case of *Pritchard v. Draper*,<sup>6</sup> where Lord Brougham held, that the admission of one partner, as to the payment, subsequently to a dissolution, of a debt due to the firm, was admissible against the other partners.

§ 599. In the case just cited, the party making the admission § 536. was at the time, so far as the debt in question was concerned, jointly interested with the parties against whom his statement was tendered in evidence.<sup>7</sup> Had not such been the case, the decision would probably have been the other way; for where a bill was filed to set aside a bond given to a banking firm on the ground of fraud, and it appeared that before the commencement of the suit, the partner, who originally managed the transaction, had retired from the firm, had become a certificated bankrupt, and, according to his

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<sup>1</sup> *Sandilands v. Marsh*, 2 B. & A. 673, 678, 679; *R. v. Hardwick*, 11 East, 589; *Fox v. Clifton*, 6 Bing. 792; *Nicholls v. Dowding*, 1 Stark. R. 81; *Hodenpyl v. Vingerhoed*, Chitty, Bills, 627, n. g; *Van Reimsdyk v. Kane*, 1 Gall. 630, 635; *Coit v. Tracy*, 8 Conn. 268. Ante, § 185.

<sup>2</sup> *Latch v. Wedlake*, 11 A. & E. 959, 965, 966.

<sup>3</sup> *Wood v. Braddick*, 1 Taunt. 105, per Sir J. Mansfield; *Petherick v. Turner*, cited id.; *Kilgour v. Finlyson*, 1 H. Bl. 155.

<sup>4</sup> *Burton v. Issitt*, 5 B. & A. 267; *Bell v. Morrison*, 1 Pet. 371.

<sup>5</sup> *Wood v. Braddick*, 1 Taunt. 104. See *Parker v. Morrell*, 2 Phill. 453.

<sup>6</sup> 1 Russ. & Myl. 191, 199, 200. See *Loomis and Jackson v. Loomis*, 3 Deane, Verm. R. 198, where it was held generally, that the admissions of one partner, made after the dissolution of partnership, in regard to the business of the firm previously transacted, are admissible as evidence against all the partners.

<sup>7</sup> See and compare the observations of Ld. Cottenham, in *Parker v. Morrell*, 2 Phill. 464, 465; of the Reporter in S. C. 464, n. b; and of Crosswell, J., in S. C. on issue tried at Nisi Prius, 2 C. & Kir. 603.

own admission, had long ceased to have any interest in the bond, the court held that the answer of this man, who had been made a defendant as executor of another partner, and who admitted the fraud, was not receivable in evidence against his co-defendants, the continuing partners.<sup>1</sup>

§ 600. It deserves notice, that neither a written acknowledgment § 537 of a partnership debt by one member of a firm, nor a written promise by him to pay it, nor even actual payment by him of the interest, or part payment of the principal due, whether made during the partnership, or after the dissolution,<sup>2</sup> will take the case out of the Statute of Limitations, as against the other members;<sup>3</sup> but this,—as will hereafter appear,<sup>4</sup>—is owing to the salutary operation of Lord Tenterden's Act of 1828,<sup>5</sup> as extended by the Mercantile Law Amendment Act of 1856.<sup>6</sup>

§ 601. It is true that Lord Tenterden's Act, in the enactment § 538 just referred to, speaks merely of *joint contractors*, and does not in terms mention *partners*; and consequently here,—as in other cases where the language of the Legislature is in the remotest degree doubtful,—a distinction has been attempted to be drawn between these two classes of persons, and it has been contended that a signature by one of several partners, *using the name of the firm*, will take the case out of the statute as to all the partners, in a transaction in which all are interested, because a partnership name is the name of each and every member of the firm. In the case where this subtle and forlorn point was raised, the court found it unnecessary to express an opinion upon it;<sup>7</sup> but as a ruling in its favour would manifestly fritter away the provisions of a very beneficial enactment, it is presumed that, if the objection should again be taken, the judges would not hesitate to negative its validity.<sup>8</sup>

<sup>1</sup> Parker v. Morrell, 2 Phill. 453; 2 C. & Kir. 599, S. C.

<sup>2</sup> Bristow v. Miller. 11 Ir. Law R. 461; Watson v. Woodman, 20 Law Rep., Eq. 721; 45 L. J., Ch. 57; S. C.

<sup>3</sup> Jones v. Ryder, 4 M. & W. 32; Hopkins v. Logan, 5 id. 248, per Parks, B.

<sup>4</sup> Post, §§ 744, 745.

<sup>5</sup> 9 G. 4, c. 14, § 1.

<sup>6</sup> 19 & 20 V., c. 97, § 14.

<sup>7</sup> Clark v. Alexander, 8 Scott, N. R. 160, 163.

<sup>8</sup> See Bristow v. Miller, 11 Ir. Law R. 461.

§ 602.<sup>1</sup> The *declarations of agents* are admissible against their principals on grounds very similar to those which govern the declarations of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. What-  
ever, therefore, the agent does in the lawful prosecution of that business, is the act of the principal; and as Mr. Justice Story observes, "where the acts of the agent will bind the principal, there his representations, declarations, and admissions, respecting the subject matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*."<sup>2</sup> They are original evidence and not hearsay; and, not being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them.<sup>3</sup> Still, the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him: but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*.<sup>4</sup> When the agent's right to interfere in the particular matter has ceased, the principal can no longer be affected by his declarations, any more than by his acts, but they will be rejected in such case as mere hearsay.<sup>5</sup>

§ 603. Thus, when a horse-dealer, or livery-stable keeper, employs a servant to sell a horse, any statement made by him respecting the horse at the time of sale, even though it amount to a warranty of soundness,<sup>6</sup> which the servant has been really ordered

<sup>1</sup> Gr. Ev. § 113, in part.

<sup>2</sup> Story, Agen. § 134.

<sup>3</sup> Doe v. Hawkins, 2 Q. B. 212.

<sup>4</sup> See Kirkstall Brewery Co. v. Furness Ry. Co., 9 Law Rep., Q. B. 468; 43 L. J., Q. B. 142, S. C.; Re Devala Prov. Gold Min. Co., L. R., 22 Ch. D. 593; 52 L. J., Ch. 434, S. C.

<sup>5</sup> Fairlie v. Hastings, 10 Ves. 123, 126, 127, per Sir W. Grant; Garth v. Howard, 8 Bing. 451; Langhorn v. Allnutt, 4 Taunt. 519, per Gibbs, J.; Betham v. Benson, Gow, R., 45, per Dallas, C. J.; Mortimer v. M'Callan, 6 M. & W. 58, 69, 73; R. v. Hall, 8 C. & P. 358, per Littledale, J.; The Mechanics' Bk. of Alexandria v. Bk. of Columbia, 5 Wheat. 336, 337; Hannay v. Stewart, 6 Watts, 487, 489; Stockton v. Demuth, 8 Watts, 39; Stewartson v. Watts, id. 392; Baring v. Clark, 19 Pick. 220; Bk. of Monroe v. Field, 2 Hill, R. 445; Story Agen. §§ 134, 137.

<sup>6</sup> Brady v. Tod, 30 L. J., C. P. 224, per Erle, C. J. But the servant of a (3401)

not to give, will, as it seems, bind the master;<sup>1</sup> but the servant's declarations or acknowledgments at any other time, whether made to the purchaser or to a stranger, will not be received.<sup>2</sup> So, if a letter written by an agent form the whole or part of an agreement, which by the course of his business he was authorised to make, it will be admissible against the principal; but if it be offered as proof of the contents of a pre-existing contract, or if it contain an account of transactions already performed, it will probably be rejected, though addressed to the principal himself;<sup>3</sup> unless the principal has replied to it, or has otherwise adopted or acted upon it, in which case the agent's letter will be received as explanatory of the principal's conduct.<sup>4</sup>

§ 604. The law upon this subject has been well explained by Sir William Grant, in the case of *Fairlie v. Hastings*.<sup>5</sup> "As a general proposition," said he, "what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their

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private owner, intrusted to sell a horse, not at a fair or public mart, but on some one particular occasion, has no implied authority to bind his master by a warranty, *id.* 223; S. C. *nom.* *Brady v. Todd*, 9 Com. B., N. S. 592. See *Miller v. Lawton*, 3 New R. 430; 15 Com. B., N. S. 834, S. C.

<sup>1</sup> *Howard v. Sheward*, 36 L. J., C. P. 42; 2 Law Rep., C. P. 148, S. C.

<sup>2</sup> *Allen v. Denstone*, 8 C. & P. 760, per Erskine, J.; *Helyear v. Hawke*, 5 Esp. 72, per Ld. Ellenborough. See, also, *Peto v. Hague*, 5 Esp. 134, per Ld. Ellenborough; *Gt. West. Ry. Co. v. Willis*, 34 L. J., C. P. 195; 18 Com. B., N. S. 748, S. C.

<sup>3</sup> *Fairlie v. Hastings*, 10 Ves. 128; *Langhorn v. Allnutt*, 4 Taunt. 511; *Kahl v. Jansen*, *id.* 565; *Reyner v. Pearson*, *id.* 662.

<sup>4</sup> *Coates v. Bainbridge*, 5 Bing. 58.

<sup>5</sup> 10 Ves. 128, 127.

quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as agent.

\* \* \* The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission; and is not permitted to contradict it. But it is impossible to say that a man is precluded from questioning or contradicting anything any person has asserted as to him, respecting his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."

§ 605. As the rule admitting the declarations of the agent is § 541 founded upon his legal identity with the principal, they bind only so far as the agent had authority to make them.<sup>1</sup> The declarations, therefore, and acts of an agent cannot bind an infant, because an infant cannot appoint an agent; and, consequently, if an infant, even by letter of attorney, appoints a person to make a lease, he will not be bound thereby, neither will his ratification bind him; but the lease of an infant to be good, must be his own personal act.<sup>2</sup> When, however, the principal is of full age, and the authority is express, he will be bound by the declarations and acts of his agent, and no difficulty can well arise in applying this rule; but questions of much nicety will often occur, where power to make an admission is sought to be inferred by implication from an authority to do a certain act. A few examples may furnish some guide upon this subject. Thus, where a wife is authorised, in her husband's absence, to carry on the business of his shop, her admissions, made on application to pay for goods previously delivered at the shop, will

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<sup>1</sup> See *Faussett v. Faussett*, 7 Ec. & Mar. Cas. 93—95; *Hogg v. Garrett*, 12 Ir. Eq. R. 559.

<sup>2</sup> *Doe v. Roberts*, 16 M. & W. 778, 780, 781, per Parke, B. See *Hargrave v. Hargrave*, 12 Beav. 408.

be received in evidence against the husband;<sup>1</sup> but her acknowledgments of an antecedent contract for the hire of the shop, or her agreement to make a new contract for the future occupation of it, will be rejected, as it cannot be necessary that the wife should have this extensive power of binding her husband, for the mere purpose of conducting the business of the shop.<sup>2</sup> So, if goods were deposited with a pawnbroker in the ordinary course of his business, a declaration of the shopman that his master had received the goods, would probably be admissible against the master, because it might well be assumed that the shopman was authorised to answer any inquiries respecting the goods, made by persons interested in them; but if the admission related to a transaction unconnected with the immediate business of the shop,—as, for instance, if it referred to the loan of several hundred pounds on a single pledge at five per cent. interest,—it would not be received.<sup>3</sup> Again, although the solicitor of a judgment creditor may fairly be assumed to have acted as his client's agent in directing the issue of a *fi. fa.*, because the taking such a step might be essentially necessary for the benefit of the client, yet the law would not consider that he was acting within the scope of any implied authority, were he to give to the sheriff special instructions to seize particular goods.<sup>4</sup>

§ 806.<sup>5</sup> The foregoing observations will have shown that there are *three classes of declarations*, which, though usually treated under the head of hearsay, are, in truth, *original* evidence; the *first* class consisting of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question; the *second* including expressions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry; and the *third* embracing all other cases, where the declaration offered in evidence may be regarded as part of the *res gestæ*. All these classes are involved in the principle of the last, and have been separately treated merely for the sake of greater distinctness.

<sup>1</sup> Clifford v. Burton, 1 Bing. 192; 8 Moore, 16, S. C.

<sup>2</sup> Meredith v. Footner, 11 M. & W. 202.

<sup>3</sup> Garth v. Howard, 8 Bing. 451.

<sup>4</sup> Smith v. Keal, L. R., 9 Q. B. D. 340, per Ct. of App.; 51 L. J., Q. B. 487, S. C., in court below, nom. Keal v. Smith.

<sup>5</sup> Gr. Ev. § 123, in great part.

## CHAPTER VIII.

## MATTERS OF PUBLIC AND GENERAL INTEREST.

§ 607.<sup>1</sup> HAVING illustrated the nature of hearsay evidence, shown § 543 the reasons on which it is generally excluded, and explained the distinction between such evidence and that which is original, it will next be convenient to consider *the cases in which the rule rejecting hearsay has been relaxed*. These cases may be conveniently divided into six classes:—first, those relating to matters of public and general interest; secondly, those relating to pedigree; thirdly, those relating to ancient possession; fourthly, declarations against interest;—fifthly, declarations in the course of office or business; and lastly, dying declarations. It will be observed, that these exceptions, which are allowed only on the ground of the assumed absence of better evidence, and, as it were, from necessity, meet most of the inconveniences that, would result from a stern and universal application of the rule, and thus remove the principal objections which have been urged against it. The exceptions will now be discussed in their order.

§ 608. And *first*, the admissibility of hearsay evidence respect- § 544 ing matters of *public and general interest*, appears to rest mainly on the following grounds:—that the origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; that in matters, in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public, and as the nature of such rights much lessens the probability, if it does not exclude the possibility, of individual bias, what is dropped in conversation respecting them may be presumed to be true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false;

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<sup>1</sup> Gr. Ev. § 127, in part.  
(3405)

that reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all more or less interested in investigating the subject; that such concurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share.<sup>1</sup>

§ 609.<sup>2</sup> In speaking of matters of public and general interest, the terms “public” and “general” are sometimes used as synonyms, meaning merely what concerns a multitude of persons.<sup>3</sup> But, in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term *public* being strictly applied to that which concerns *every member* of the state; and the term *general* being confined to a lesser, though still a considerable, portion of the community. This distinction should be carefully attended to, because in matters strictly public, such, for example, as a claim of highway or a right of ferry, reputation from any one appears to be receivable; and although declarations would be almost worthless, unless made by persons who, by living in the neighbourhood, or by frequently using the road or ferry, or the like, are shown to have had some means of knowledge; yet, the want of such proof of their connexion with the subject in question seems to affect the value only, and not the admissibility, of the evidence. If, however, the right in dispute be simply general; that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons wholly unconnected with the place or business would be not only valueless, but probably altogether inadmissible.<sup>4</sup>

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<sup>1</sup> Wright v. Doe d. Tatham, 7 A. & E. 360, 361, per Coltman, J.; S. C. 4 Bing. N. C. 528, per Alderson, B.; Moorwood v. Wood, 14 East, 239, n., per Ld. Kenyon; Weeks v. Sparke, 1 M. & Sel. 686, per Ld. Ellenborough; Berkeley Peer., 4 Camp. 415, 416, per Sir J. Mansfield; R. v. Bedfordshire, 4 E. & B. 542, per Ld. Campbell, adopting almost the language above employed.

<sup>2</sup> Gr. Ev. § 128, in part.

<sup>3</sup> Pim v. Currell, 6 M. & W. 234.

<sup>4</sup> Crease v. Barret, 1 C. M. & R. 929, per Parke, B. By the Roman law, reputation, or common fame, seems to have been admissible in evidence in all cases; but it was not generally deemed sufficient proof, and, in some cases,



§ 610. Thus, if a dispute were to arise respecting the existence of a local custom, in which all the tenants of a manor were interested, evidence of reputation would be admissible, not only from any deceased tenant, but from any deceased resident within the manor; for it might fairly be presumed that the residents, being persons conversant with the neighborhood, would be acquainted with the local customs.<sup>1</sup> So,<sup>2</sup> where the question was whether Nottingham Castle was within the hundred of Broxtowe, certain ancient orders, which were made by the Justices at the Quarter Sessions for the county, and in which the castle was described as being within that hundred, were held admissible evidence of reputation; the justices, though not proved to have been residents within the county or hundred, being presumed, from the nature and character of their offices alone, to have had sufficient acquaintance with the subject in dispute, to make the statements in their order admissible.<sup>3</sup>

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not even *semiplena probatio*, unless corroborated; *nisi aliis adminiculis adjuvetur*. 1 Masc. de Prob., Concl. 171, n. 1; Concl. 183, n. 2; Concl. 547, n. 19. It was held sufficient, *plena probatio*, where, from the nature of the case, better evidence was not attainable; *ubi à communiter accidentibus, probatio difficilis est, fama plenam solet probationem facere; ut in probatione filitionis*. But Mascardus deems it not sufficient, in cases of pedigree within the memory of man, which he limits to fifty-six years, unless aided by other evidence—*tunc nempe non sufficeret publica vox et fama, sed una cum ipsâ deberet tractatus et nominatio probari, vel alia adminicula urgentia adhiberi*. 1 Masc. de Prob., Concl. 411, n. 1, 2, 6, 7.

<sup>1</sup> *Ld. Dunraven v. Llewellyn*, 15 Q. B. 809, per Parke, B. See *Warrick v. Queen's Coll.*, Oxford, 40 L. J., Ch. 785, 788, per *Ld. Hatherley, C.* The actual discussion of the subject in the neighbourhood, was a fact also relied on, in the Roman law, in cases of proof by common fame. "Quando testis vult probare aliquem scivisse, non videtur sufficere, quod dicat ille scivit quia erat vicinus; sed debet addere, in vicinia hoc erat cognitum per famam, vel alio modo; et ideo iste, qui erat vicinus, potuit id scire." 2 Menoch. de Præs. lib. 6, Præs. 24, n. 17, p. 772. See, also, 1 Masc. de Prob. 389, 390, Concl. 395, n. 1, 2, 19, 9, where the law is thus laid down:—"Confines probantur per testes. Verum scias velim, testes in hac materiâ, qui vicini, et circum ibi habitant, esse magis idoneos quam alios. Si testes non sentiant commodum vel incommodum immediatum, possint pro suâ communitate deponere. Licet hujusmodi testes sint de universitate, et deponant super confinibus suæ universitatis, probant, dummodum præcipuum ipsi commodum non sentiant licet inferant commodum in universum."

<sup>2</sup> Gr. Ev. § 129, in part.

<sup>3</sup> *D. of Newcastle v. Broxtowe*, 4 B. & Ad. 273.

(3407)

§ 611. Again, when the question related to the custom of mining in a particular district, persons, under whose estates the minerals lay, with respect to which the custom was said to exist, were held to be sufficiently connected with the subject to make their declarations evidence, as they were more likely than others living at a distance to become adventurers, and consequently to be subjected to the operation of the custom.<sup>1</sup> But where the point at issue was, whether the City of Chester anciently formed part of the County Palatine, an old document, purporting to be a decree of certain law officers and dignitaries of the Crown, not having authority as a Court, was held inadmissible as evidence of reputation, because those personages had no peculiar knowledge of the subject, excepting what they derived in the course of that unauthorised proceeding.<sup>2</sup> Hence it appears that *competent knowledge in the declarant* is an essential pre-requisite to the admission of his testimony; and although all the Queen's subjects are presumed to have that knowledge, in some degree, where the matter is of public concernment, yet, in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required.

§ 612. If the quality of the hearsay itself raises a natural inference that it was derived from persons acquainted with the subject, the courts will not require independent proof of that fact; and, therefore, where the question turned on a manorial custom, depositions, purporting to have been made by copyholders in an ancient suit between a former lord and a person claiming admission to a copyhold, were admitted in evidence without proof that the persons making them were either copyholders, or were otherwise acquainted with the customs of the manor; for the court assumed that such persons would not have been brought forward as witnesses, had they been ignorant of the subject.<sup>3</sup> So, an ancient unsigned customary of a manor, which

<sup>1</sup> Crease v. Barrett, 1 C. M. & R. 919, 928—930.

<sup>2</sup> Rogers v. Wood, 2 B. & Ad. 245, 256, recognised by the Ct. of Ex. in Crease v. Barrett, 1 C. M. & R. 928, 929. See, also, Evans v. Taylor, 7 A. & E. 617, 626, 627. But see Freeman v. Read, 32 L. J., M. C. 226; 4 B. & S. 174, S. C.

<sup>3</sup> Freeman v. Phillippa, 4 M. & Sel. 486.  
(3408)

purported to be *ex assensu omnium tenentium*, and which had been handed down with the court rolls from steward to steward, was received as evidence to prove the course of descent within the manor.<sup>1</sup> But where, in order to prove the boundaries of a manor, an ancient survey was produced from the proper custody, which purported to have been made in the time of Queen Elizabeth by a deputy surveyor appointed by the Crown, and to have been founded on the presentments of certain tenants of the manor, whose names were appended to it, the court rejected the document, on the ground that no proof had been given that the deputy surveyor had any authority to institute the inquiry; and, stripped of this authority, he not only had no right to make any kind of return, but the presumption that he did make one fell to the ground. The paper might have been written by any clerk idling in the office where it was found, from his own imagination, or compiled, possibly, by some interested person in furtherance of a sinister object of his own.<sup>2</sup>

§ 613. It may be here expedient to enumerate a few of the principal questions, which have been deemed to involve matters of public or general interest, and to contrast these with some others, which the courts have considered to be of too private a nature, to allow of their being illustrated by evidence of reputation. Thus, on the one hand, *hearsay*,—or, in other words, *evidence of reputation*,—has been admitted, where the question related to a right of common existing by immemorial custom,<sup>3</sup> a feeding per cause de vicinage resting on a similar foundation,<sup>4</sup> a parochial<sup>5</sup> or other district modus,<sup>6</sup> a manorial custom,<sup>7</sup> a custom of mining

<sup>1</sup> *Denn v. Spray*, 1 T. R. 466, 473. See *Chapman v. Cowlan*, 13 East, 10.

<sup>2</sup> *Evans v. Taylor*, 7 A. & E. 617, 626, 627. See, also, *D. of Beaufort v. Smith*, 4 Ex. R. 450; *Daniel v. Wilkin*, 7 Ex. R. 429. But see *Freeman v. Read*, 32 L. J., M. C. 226; 4 B. & S. 174, S. C.; *Smith v. Ld. Brownlow*, 9 Law Rep., Eq. 241; *D. of Devonshire v. Neill*, 2 L. R. Ir, 132. 160—162, per Palles, C. B.

<sup>3</sup> *Weeks v. Sparke*, 1 M. & Sel. 679; explained in *Ld. Dunraven v. Llewellyn*, 15 Q. B. 811, 812.

<sup>4</sup> *Prichard v. Powell*, 10 Q. B. 589; explained in *Ld. Dunraven v. Llewellyn*, 15 Q. B. 812.

<sup>5</sup> *Moseley v. Davies*, 11 Price, 162; *White v. Lisle*, 4 Madd. 214, 224, 225; *Short v. Lee*, 4 Jac. & W, 464, 473.

<sup>6</sup> *Rudd v. Wright*, 1 Ph. Ev. 240.

<sup>7</sup> *Doe v. Sisson*, 12 East, 62.

in a particular district,<sup>1</sup> a custom of a corporation to exclude foreigners from trading within a town,<sup>2</sup> the limits of a town,<sup>3</sup> the extent of a parish,<sup>4</sup> the boundary between counties, parishes, hamlets, or manors,<sup>5</sup> or even between a *reputed* manor,—that is, an estate which from some intervening defect has ceased to be an actual manor,—and the freehold of a private individual,<sup>6</sup> or between *old* and *new* land in a manor,<sup>7</sup> a claim of tolls on a public road,<sup>8</sup> the fact whether a road was public or private,<sup>9</sup> a prescriptive liability to repair sea-walls,<sup>10</sup> or bridges,<sup>11</sup> a claim of highway,<sup>12</sup> a right of ferry,<sup>13</sup> the fact whether land on a river was a public landing-place or not,<sup>14</sup> the existence and rights of a parochial chapelry,<sup>15</sup> the jurisdiction of a court, and the fact whether it was a court of record or not,<sup>16</sup> the existence of a manor,<sup>17</sup> a prescriptive right of toll on all malt brought by the west country barges to London,<sup>18</sup> a right by immemorial custom, claimed by the deputy day meters of London, to measure, shovel, unload and deliver all oysters brought by boat for sale within the limits of

<sup>1</sup> *Crease v. Barrett*, 1 C. M. & R. 919, 928—930.

<sup>2</sup> *Davies v. Morgan*, 1 C. & J. 587, *semble*.

<sup>3</sup> *Ireland v. Powell*, cited *Pea. Ev.* 16, per *Chambre, J.*, and recognised by *Williams, J.*, in *R. v. Bliss*, 7 A. & E. 555.

<sup>4</sup> *R. v. Mytton*, 2 E. & E. 557; *S. C. nom. Mytton v. Thornbury*, 29 L. J., M. C. 109.

<sup>5</sup> *Nicholls v. Parker*, 14 East, 331, n.; *Brisco v. Lomax*, 8 A. & E. 198; 3 N. & P. 388, S. C.; *Evans v. Rees*, 10 A. & E. 151; 2 P. & D. 627, S. C.; *Plaxton v. Dare*, 10 B. & C. 17; 5 M. & R. 1, S. C.; *Thomas v. Jenkin*, 6 A. & E. 525; 1 N. & P. 588, S. C.

<sup>6</sup> *Doe v. Sleeman*, 9 Q. B. 298.

<sup>7</sup> *Barnes v. Mawson*, 1 M. & Sel. 81.

<sup>8</sup> *Brett v. Beales*, M. & M. 416, 418, per *Ld. Tenterden*.

<sup>9</sup> *R. v. Bliss*, 7 A. & E. 555, per *Williams, J.*

<sup>10</sup> *R. v. Leigh*, 10 A. & E. 398, 409, 411. The mere fact that each frontager has always repaired the sea wall in front of his land is not, in itself, sufficient evidence of a prescriptive liability to maintain the wall. *Hudson v. Tabor*, L. R., 2 Q. B. D. 290, per *Ct. of App.*; 46 L. J., Q. B. 463, S. C.

<sup>11</sup> *R. v. Sutton*, 8 A. & E. 516; 3 N. & P. 569, S. C.

<sup>12</sup> *Crease v. Barrett*, 1 C. M. & R. 929, per *Parke, B.*; *Reed v. Jackson*, 1 East. 355.

<sup>13</sup> *Pim v. Curell*, 6 M. & W. 234.

<sup>14</sup> *Drinkwater v. Porter*, 7 C. & P. 181, per *Coleridge, J.*

<sup>15</sup> *Carr v. Mostyn*, 5 Ex. R. 69.

<sup>16</sup> *Goodtitle v. Dew*, *Pea. Add. Cas.* 204.

<sup>17</sup> *Steel v. Prickett*, 2 Stark. R. 466, per *Abbott, C. J.*; *Curzon v. Lomax*, 5 Esp. 60, per *Ld. Ellenborough*.

<sup>18</sup> *City of London v. Clerke*, *Carth.* 181; *D. of Beaufort v. Smith*, 4 Ex. R. 450.

the port of London,<sup>1</sup> a claim by the lord of a manor to all coals lying under a certain district of the manor,<sup>2</sup> a claim of heriot custom in respect of freehold tenements within a manor held in fee-simple,<sup>3</sup> a custom of electing churchwardens by a select committee,<sup>4</sup> and a prescriptive right to free warren as appurtenant to an entire manor.<sup>5</sup>

§ 614. On the other hand, evidence of *reputation has been re-* § 549  
*jected*, where the question was, what usage had obtained in electing a schoolmaster to a grammar school,<sup>6</sup> whether the sheriff of the county of Chester, or the corporation of the city of Chester, was bound to execute criminals,<sup>7</sup> whether certain tenants of a manor had *prescriptive* rights of common for cattle levant and couchant,<sup>8</sup> what were the boundaries of a waste over which many of the tenants of a manor claimed a right of common appendant,<sup>9</sup> whether the lord of a manor had a prescriptive right to all wreck within his manorial boundaries,<sup>10</sup> whether the plaintiff was exclusive owner of the soil, or had a right of common only,<sup>11</sup> whether the land in dispute had been purchased by a former occupier, or was part of an entailed estate of which he had been tenant for life,<sup>12</sup> what patron formerly had the right of presentation to a living,<sup>13</sup> whether a *farm modus* existed, and what was its nature,<sup>14</sup>

<sup>1</sup> *Laybourn v. Crisp*, 4 M. & W. 320.

<sup>2</sup> *Barnes v. Mawson*, 1 M. & Sel. 77, 81. In that case evidence was given of an uniform exercise of the right.

<sup>3</sup> *Damerell v. Protheroe*, 10 Q. B. 20.

<sup>4</sup> *Berry v. Banner*, Pea. R. 156.

<sup>5</sup> *Ld. Carnarvon v. Villebois*, 13 M. & W. 313.

<sup>6</sup> *Withnell v. Gartham*, 1 Esp. 324, 325, per *Ld. Kenyon*.

<sup>7</sup> *R. v. Antrobus*, 2 A. & E. 793—795.

<sup>8</sup> See *Ld. Dunraven v. Llewellyn*, 15 Q. B. 791, 811, 812, overruling *Weeks v. Sparke*, 1 M. & Sel. 679; *Williams v. Morgan*, 15 Q. B. 782. See, also, and compare *Warrick v. Queen's Coll.*, Oxford, 40 L. J. 785, 788, per *Ld. Hatherley*, C.

<sup>9</sup> *Ld. Dunraven v. Llewellyn*, 15 Q. B. 791.

<sup>10</sup> *Talbot v. Lewis*, 1 C. M. & R. 495; 5 Tyr. 1, S. C. As to what constitutes "wreck" distinguished from "flotsam," see *Stackpoole v. The Queen*, 1 R., 9 Eq. 619.

<sup>11</sup> *Richards v. Bassett*, 10 B. & C. 663, *semble*, per *Littledale, J.*; *sed qu.*

<sup>12</sup> *Doe v. Thomas*, 14 East, 323; 2 Smith, L. C. 432, S. C.

<sup>13</sup> Per *Ld. Kenyon*, in *R. v. Eriswell*, 3 T. R. 723, questioning *Bp. of Meath v. Ld. Belfield*, 1 Wils. 215.

<sup>14</sup> *Wells v. Jesus College*, 7 C. & P. 284, per *Alderson, B.*; *White v. Lisle*, (3411)

whether a party had a private right of way over a particular field,<sup>1</sup> whether the tenants of a particular manor had the right of cutting and selling wood,<sup>2</sup> and what were the boundaries between two private estates.<sup>3</sup> Where, however, it was shown by direct testimony, the admission of which was unopposed, that the boundaries of the farm in question were identical with those of a hamlet, evidence of reputation as to the hamlet boundaries was let in for the purpose of proving those of the farm; for though it was objected that evidence should not be thus indirectly admitted in a dispute between private individuals, the court overruled the objection, Mr. Justice Coleridge observing, that "he never heard that a fact was not to be proved in the same manner when subsidiary, as when it was the very matter in issue."<sup>4</sup>

§ 615. The question, whether evidence of reputation is admissible to prove or disprove a *private prescriptive right* or liability, is involved in some doubt.<sup>5</sup> In the case of *Morewood v. Wood*, where a prescriptive right of digging stones on the lord's waste was claimed by the defendant, as annexed to his estate, and the lord offered evidence of reputation to prove that no such right existed, the Judges of the Court of King's Bench were equally divided on its admissibility;<sup>6</sup> but, since in that case it is difficult to see how the public could have been interested in the matter, unless it had been shown,—which it was not,—that the rights of the commoners were infringed by the defendant's claim, such evidence would probably at the present day be rejected.<sup>7</sup> It has, however, been determined by the Court of Queen's Bench, that, on the trial of an

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4 Madd. 214, 224, 225; *Wright v. Rudd*, cited 1 Ph. Ev. 241, per Ld. Lyndhurst. See, however, *Webb v. Petts*, Noy, 44; *Donnison v. Elsley*, 3 Eag. & Y. 1396, n.; and cases cited, 1 Ph. Ev. 241, n. 2.

<sup>1</sup> *Semble*, per Dampier, J., in *Weeks v. Sparke*, 1 M. & Sel. 691; and per Ld. Kenyon, in *Reed v. Jackson*, 1 East, 357.

<sup>2</sup> *Blackett v. Lowes*, 2 M. & Sel. 494, 500, per Ld. Ellenborough.

<sup>3</sup> *Clothier v. Chapman*, 14 East, 331, n. By the Roman law, the evidence of reputation seems to have been deemed admissible, even in matters of private boundary. See 1 Masc. de Prob. 391, Concl. 396.

<sup>4</sup> *Thomas v. Jenkins*, 6 A. & E. 525, 529; 1 N. & P. 588, S. C. See, also, *Brisco v. Lomax*, 8 A. & E. 198, 213; 3 N. & P. 388, S. C.

<sup>5</sup> See *Prichard v. Powell*, 10 Q. B. 589.

<sup>6</sup> 14 East, 327, n.

<sup>7</sup> See ante, §§ 610, 611.

indictment against the inhabitants of a county for the non-repair of a public bridge, to which the defendants had pleaded that certain persons named were liable to repair the bridge *ratione tenuræ*, evidence of reputation was admissible to support the plea.<sup>1</sup> In this case it was very properly considered that the fixing an individual with, or relieving him from, such a liability as the one in question, had a necessary tendency to abridge or increase the liability of the whole neighbourhood,<sup>2</sup>—and, moreover, that the admissibility of evidence of reputation, when tendered to *disprove* a public liability or right, could not be governed by a different principle from that which prevails, when such evidence is offered to *establish* the liability or right.<sup>3</sup>

§ 616.<sup>4</sup> The probable want of competent knowledge in the declarant is the reason generally assigned for rejecting evidence of reputation or common fame, in the matters of mere *private right*. "Evidence of reputation upon general points is receivable," said Lord Kenyon, "because, all mankind being interested therein, it is natural to suppose, that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs, or private prescriptions? How is it possible for strangers to know anything of what concerns only private titles?"<sup>5</sup> It may not on all occasions be an easy matter to distinguish between public and private rights, and some few of the cases cited above in illustration of the subject, may possibly be considered to rest on somewhat doubtful reasoning. Still, the general rule of law cannot be disputed; namely, that if the matter in question be of a public or general nature,—that is, if it be interesting to the community at large, or even to a comparatively small portion of the community, such, for example, as the inhabitants of a parish, a town, or a manor,—it falls within the exception by which evidence of reputation is admitted; whereas, if

<sup>1</sup> R. v. Bedfordshire, 4 E. & B. 535; overruling R. v. Wavertree, 2 M. & Rob. 353, and confirming R. v. Cotton, 3 Camp. 444.

<sup>2</sup> See Prichard v. Powell, 19 Q. B. 599, per Patteson, J.

<sup>3</sup> See Drinkwater v. Porter, 7 C. & P. 181, per Coleridge, J.; and post, § 620.

<sup>4</sup> Gr. Ev. § 137, in part.

<sup>5</sup> Morewood v. Wood, 14 East, 329, n.

it have no connexion with the exercise of any public right, or the discharge of any public duty, or with any other subject of general interest, it falls within the ordinary rule by which hearsay evidence is excluded.

§ 617.<sup>1</sup> The necessity for competent knowledge in the declarant § 552 may serve to explain and reconcile what is said in the books respecting the inadmissibility of *reputation* in regard to *particular facts*. Upon general points, as we have seen, such evidence is receivable, because of the general interest which the community have in them; but particular facts, not being equally notorious, may be misrepresented, or misunderstood, and may have been connected with other facts, by which, if known, their effect might be limited or explained. Reputation as to the existence of such particular facts is therefore rejected. Thus, if the question be whether a road be public or private, declarations of old persons since dead, that they have seen repairs done upon it, will not be admissible;<sup>2</sup> neither can evidence be received that a deceased person planted a tree near the road, and stated at the time of planting it that his object was to show where the boundary of the road was when he was a boy.<sup>3</sup> So, proof of old persons having been heard to say that a stone was erected, or boys whipped, or cakes distributed, at a particular place, will not be admissible as evidence of boundary;<sup>4</sup> and where the question was whether a turnpike stood within the limits of a town, though evidence of reputation was received to show that the town extended to a certain point, yet declarations, by old people, since dead, that formerly houses stood where none any longer remained, was rejected, on the ground that these statements were evidence of a particular fact.<sup>5</sup> So, also, if the existence and amount of a parochial modus be in issue, hearsay evidence of the payment of a specific sum in lieu of tithes by a deceased occupier will be inadmissible; though general evidence of reputation, that it has always been

<sup>1</sup> Gr. Ev. § 138, in part.

<sup>2</sup> Per Patteson, J., in *R. v. Bliss*, 7 A. & E. 552.

<sup>3</sup> *R. v. Bliss*, 7 A. & E. 550.

<sup>4</sup> Per Coleridge, J., in *R. v. Bliss*, 7 A. & E. 556.

<sup>5</sup> *Ireland v. Powell*, per Chambre, J., Pea. Ev. 16, cited by Williams, J., in *R. v. Bliss*, 7 A. & E. 555.



customary to pay that sum for all the lands in the parish, will be received.<sup>1</sup>

§ 618. Again, where the question was whether a certain place was parcel of a particular parish, an old book containing entries by a deceased churchwarden, not charging himself, but relating to the repairs of a chapel alleged to belong to the place in question, was held to be inadmissible;<sup>2</sup> and the same ruling has prevailed, where entries in parish books, which recorded the fact that perambulations had taken a particular line, were tendered in evidence.<sup>3</sup> Still, it has been usual to admit evidence of what old persons, since deceased, who accompanied the perambulators, have been heard to say upon such occasions;<sup>4</sup> because the custom of perambulating parishes having long received high judicial sanction as a legitimate mode of recording boundaries,<sup>5</sup>—and the fact of a perambulation having taken place being considered in itself evidence of the exercise of a right,<sup>6</sup>—it follows that statements made by perambulators may be regarded as declarations accompanying acts, which, on grounds already explained,<sup>7</sup> will be admissible in evidence, provided they are not confined to particular circumstances.<sup>8</sup>

§ 619. The courts now hold,—contrary to a doctrine which formerly prevailed,<sup>9</sup>—that proof of the exercise of the right claimed within the period of living memory, is not an essential condition of the reception of evidence of reputation; though, of course, the absence of such proof, in cases where the nature of the subject admits of its production, will materially affect the value of hearsay

<sup>1</sup> *Harwood v. Sims*, Wightw. 112, more fully reported and explained in *Moseley v. Davies*, 11 Price, 162, 169—172; *Chatfield v. Fryer*, 1 Price, 253; *Garnons v. Barnard*, 1 Anstr. 298; 3 Eag. & Y. 380, S. C.; *Wells v. Jesus College*, 7 C. & P. 284; *Deacle v. Hancock*, McCl. 85; 13 Price, 226, S. C. See, also, *Crease v. Barrett*, 1 C. M. & R. 919, 930; 5 Tyr. 458, 472, S. C.

<sup>2</sup> *Cooke v. Banks*, 2 C. & P. 478, per Abbott, C. J.

<sup>3</sup> *Taylor v. Devey*, 7 A. & E. 409, 414.

<sup>4</sup> *Weeks v. Sparke*, 1 M. & Sel. 687, per Ld. Ellenborough, and 689, per Le Blanc, J.

<sup>5</sup> *Taylor v. Devey*, 7 A. & E. 415.

<sup>6</sup> *Weeks v. Sparke*, 1 M. & Sel. 687, 689.

<sup>7</sup> Ante, §§ 583—588.

<sup>8</sup> 1 Ph. Ev. 248.

<sup>9</sup> Per Buller, J., in *Morewood v. Wood*, 14 East, 330, n.; *Weeks v. Sparke*, 1 M. & Sel. 688, 689, per Le Blanc, J., and 690, per Dampier, J.

when received.<sup>1</sup> Neither is it necessary that the opinions of deceased persons, which are tendered as evidence of common fame, should appear to rest on reputation derived from others, or should have been expressed in the course of a transaction relating to a question of reputation; and, therefore, on an issue whether or not a lane in a certain hamlet was a common highway, a paper signed by several inhabitants of the hamlet, since dead, stating that the lane was not a highway, was received as slight evidence of reputation, although it had been drawn up at a public meeting, which had been convened for the sole purpose of considering the propriety of repairing the road, and although the opinions expressed in the document did not appear to have been founded on reputation received from others.<sup>2</sup>

§ 620.<sup>3</sup> It may further be observed, that reputation is evidence § 555 as well *against a public right* as in its favour; and this, too, whether the evidence consist of declarations which expressly negative the right, or set up an inconsistent claim, or simply omit all mention of the right on some occasion, when a notice of it might be reasonably expected. Thus, where the question was, whether a landing-place was public or private property, the declarations of ancient deceased persons, that it was the private landing-place of the party and his ancestors, were held admissible, the learned judge remarking, that no distinction could be drawn between the evidence of reputation to establish, and that to disprove, a public right.<sup>4</sup> So, where the object was to negative the existence of a particular manorial custom, the court was strongly inclined to hold,—though it became unnecessary to decide the point,—that an ancient deed, made between the lord of the manor and a great many of the copyholders, in which the latter claimed, and the former admitted and confirmed, what they mutually conceived to be

<sup>1</sup> *Crease v. Barrett*, 1 C. M. & R. 919, 930; 5 Tyr. 458, S. C.; *Ld. Dunraven v. Llewellyn*, 15 Q. B. 791, 809; *R. v. Sutton*, 8 A. & E. 523, n. c; *Curzon v. Lomax*, 5 Esp. 60, per *Ld. Ellenborough*; *Steel v. Prickett*, 2 Stark. R. 466, per *Abbott, C. J.*; *Roe v. Parker*, 5 T. R. 32, per *Grose, J.*

<sup>2</sup> *Barraclough v. Johnson*, 8 A. & E. 99, 108.

<sup>3</sup> *Gr. Ev.* § 140, in part.

<sup>4</sup> *Drinkwater v. Porter*, 7 C. & P. 181, per *Coleridge, J.*

the immemorial customs of the manor, but which deed omitted all mention of the particular custom in question, was strong evidence of reputation to show that it did not exist at that day, and that the subsequent usage relied upon in support of it was referable to usurpation, and not to right.<sup>1</sup>

§ 621.<sup>2</sup> It will have been seen from several of the cases cited § 556 in this chapter, that oral declarations are not the sole medium of proving traditional reputation in matters of public and general interest; and, indeed, the principle of the exception applies equally to documentary evidence, and to all other kinds of proof denominated hearsay. Thus deed,<sup>3</sup> leases,<sup>4</sup> and other private documents have been admitted, as declaratory of the public matters recited in them. Even copies and abstracts of old deeds and wills<sup>5</sup> have occasionally been used for the same purpose, but these are not in themselves evidence of reputation, being merely admissible as secondary evidence of the original instruments. It follows, therefore, that no such document can in strictness be received at all, without some proof being furnished of the former existence and present loss of the originals.<sup>6</sup>

§ 622. How far *maps*, showing the boundaries of counties, § 557 towns, parishes, or manors, will be admissible, is a question respecting which some doubts exist. If such maps are not proved to have been prepared by persons who were deputed to make them by some one interested in the question, or who themselves appear to have had some knowledge of their own on the subject,

<sup>1</sup> *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 218, 239—241, 244. See *D. of Portland v. Hill*, 2 Law Rep., Eq. 765.

<sup>2</sup> Gr. Ev. § 139, in part.

<sup>3</sup> *Curzon v. Lomax*, 5 Esp. 60, per Ld. Ellenborough; *Brett v. Beales*, M. & M. 416, per Ld. Tenterden.

<sup>4</sup> *Plaxton v. Dare*, 10 B. & C. 17; 1 M. & R. 1, S. C.; *Barnes v. Mawson*, 1 M. & Sel. 78, 79; *M. of Anglesey v. Ld. Hatherton*, 10 M. & W. 218; *D. of Beaufort v. Smith*.<sup>4</sup> Ex. R. 471, 472, per Parke, B.

<sup>5</sup> See *Shrewsbury Peer.*, 7 H. of L. Cas. 11, 12; *Braye Peer.*, 6 Cl. & Fin. 757—767.

<sup>6</sup> See and compare *Doe v. Skinner*, 3 Ex. R. 84; *Doe v. Whitcombe*, 6 Ex. R. 601; S. C. in Dom. Proc. 4 H. of L. Cas. 425; *Perth Peer.*, 2 H. of L. Cas. 865; and *D. of Devonshire v. Neill*, 2 L. R. Ir. 132, 149, 167, per Pallas, C. B.

or who at least are shown to have been in some way connected with the district, so as to make it probable that they possessed the requisite information, they cannot be received, whatever their age or apparent accuracy may be.<sup>1</sup> If, however, proof be forthcoming that they have been either made or recognised by persons having adequate knowledge, they would seem, on principle, to be valid evidence of reputation. Accordingly, upon the trial of an indictment against a parish for the non repair of a highway, where, in order to show that the road in question was not within the parish, a map was produced which had been made some thirty years before by a surveyor, from information derived from an old parishioner, who had pointed out to him the boundaries, Mr. Justice Erskine held, that, if proof could be given of the old man's death, the map would be admissible as evidence of reputation, though it came from the chest of the parish indicted.<sup>2</sup> On another occasion, also, maps appear to have been received as public documents;<sup>3</sup> but in an older case, where, in order to prove that the locus in quo was a highway, a copper-plate map, which purported on its face to have been taken by the direction of some former churchwardens, and which it was proposed to prove was generally received by the parish as authentic, was rejected by Ld. Kenyon, who observed, that "it would be equally improper to admit it, as to admit a plan taken by the lord of the manor, who might thereby crush and destroy the estate of his tenants."<sup>4</sup> It does not appear in this case that the map was an ancient one, or that the churchwardens, by whose direction it was drawn, were dead, and consequently the decision is of the less authority.

§ 623. Again, copies of court rolls, and especially presentments ; 568 in manor courts,<sup>5</sup> stating the customs or boundaries of a manor,—depositions of conventional tenants of a manor, taken in an

<sup>1</sup> *Hammond v. Bradstreet*, 23 L. J., Ex. 332, per Ex. Ch.; 10 Ex. R. 390, S. C. See *Pipe v. Fulcher*, 28 L. J., Q. B. 12; 1 E. & E. 111, S. C.

<sup>2</sup> *R. v. Milton*, 1 C. & Kir. 58.

<sup>3</sup> *Alcock v. Cook*, per Tindal, C. J., cited 1 Ph. Ev. 251, n. 1.

<sup>4</sup> *Pollard v. Scott*, Pea. R. 19.

<sup>5</sup> *Evans v. Rees*, 10 A. & E. 151; *Roe v. Parker*, 5 T. R. 26; *Arundell v. Ld. Falmouth*, 2 M. & Sel. 441; *Damerell v. Protheroe*, 10 Q. B. 20.

authorised inquiry, and representing the rights of the lcrd,<sup>1</sup>—and other similar documents, have been admitted as evidence of reputation;<sup>2</sup> though unless, it can be satisfactorily proved, or at least reasonably inferred, that the proceedings were conducted in a legal and regular manner, it will seldom be prudent to run the risk of a new trial by tendering such evidence.<sup>3</sup>

§ 624. It has often been said that *verdicts of juries, and judgments, decrees, and orders of courts of competent jurisdiction*, are evidence of reputation;<sup>4</sup> and possibly, when juries were summoned *de vicineto*, and were consequently assumed to be acquainted with the subject in controversy,<sup>5</sup> this may have been a correct mode of stating the ground on which verdicts were admitted; though it never could have been strictly accurate with respect to other judicial documents, and though it does not apply, at the present day, even to verdicts.<sup>6</sup> Still, these documents, though not reputation, are as good evidence as reputation;<sup>7</sup> and whatever be the principle on which they are admitted, the rule has been established by too many authorities to be now questioned,<sup>8</sup> that, in all cases, involving matters of public or general interest, wherein reputation is evidence, a verdict or a judgment upon the matter directly in issue, though pronounced in a cause litigated between strangers to the parties on the record, is also admissible; not as tending to prove *any specific fact existing at the time*, but as evidence of the most solemn kind, of an adjudication by a competent tribunal upon the state of facts and the question of usage at the time.<sup>9</sup> Thus, for example, where a public right of way was in question,

<sup>1</sup> *Crease v. Barrett*, 1 C. M. & R. 919; 5 Tyr. 458, S. C.; *Freeman v. Philipps*, 4 M. & Sel. 486; *Gee v. Ward*, 7 E. & B. 509.

<sup>2</sup> See *Evans v. Taylor*, 7 A. & E. 626, as explained in *D. of Beaufort v. Smith*, 4 Ex. R. 450; and *Daniel v. Wilkin*, 7 Ex. R. 429.

<sup>3</sup> See *R. v. Leigh*, 10 A. & E. 411.

<sup>4</sup> See post, § 1683.

<sup>5</sup> *Pim v. Curell*, 6 M. & W. 254, per Alderson, B.

<sup>6</sup> *Evans v. Rees*, 10 A. & E. 153, per Patteson & Coleridge, Js.; *Brisco v. Lomax*, 8 A. & E. 212, per Patteson, J.

<sup>7</sup> *Brisco v. Lomax*, 8 A. & E. 211, per Littledale, J.

<sup>8</sup> *Evans v. Rees*, 10 A. & E. 156, per Ld. Denman.

<sup>9</sup> *Pim v. Curell*, 6 M. & W. 266, per Ld. Abinger; *D. of Devonshire v. Neill*, 2 L. R. Ir. 154, 155, per Palles, C. B.; *Neill v. D. of Devonshire*, L. R., 8 App. Cas. 147, per Ld. Selborne, C., in Dom. Proc. S. C.

the plaintiff was allowed to show a verdict, rendered in his own favour against a defendant in another suit, in which the same right of way was in issue;<sup>1</sup> and it matters not with respect to the admissibility, though it may as to the weight, of such evidence, that the judgment has been suffered by default, and, though of a very recent date, is not supported by any proof of execution or of the payment of damages;<sup>2</sup> or even that the verdict, where a verdict has been obtained, has not been followed up by any judgment or decree.<sup>3</sup> Neither is it material whether the verdict be pronounced at Nisi Prius, or be the finding of a jury summoned under a commission from a Duchy Court, or any other special commission; provided it can be proved, or can be inferred from the circumstances, that the inquiry was a lawful one.<sup>4</sup>

§ 625. If, when the record is produced, a direct issue appears § 560 to have been raised on the right or custom in controversy, the opponent will not be entitled to show that in fact no evidence was given on that issue; since the record is conclusive of the fact of such a finding, though not of its truth as between other parties.<sup>5</sup> If the record contains no direct issue on the custom, the party producing it must furnish some evidence to show that the custom was really in question; for, otherwise, the mere verdict would prove nothing.<sup>6</sup> In the case of the *Earl of Carnarvon v. Villebois*, which was an action by the lord of a manor against a copyholder for trespassing on his free warren, an ancient judgment on a quo warranto information filed by the Attorney-General against a former lord, in which the defendant pleaded, and the Attorney-General confessed, a prescriptive title to the free warren as appurtenant to the manor, was received in evidence for the plaintiff, as being the judgment of a competent court upon a matter of a public nature, which concerned the Crown and the subject. The court observed, that "it was admissible on the same footing as an allowance before the Justices of Eyre, an inquisition post mortem, or an inquisition

<sup>1</sup> *Reed v. Jackson*, 1 East, 355. See *Petrie v. Nuttall*, 11 Ex. R. 569.

<sup>2</sup> *Ld. Carnarvon v. Villebois*, 13 M. & W. 313, 329, 332. See *R. v. Brightside Bierlow*, 13 Q. B. 933.

<sup>3</sup> *Brisco v. Lomax*, 8 A. & E. 198; 3 N. & P. 398, S. C.

<sup>4</sup> *Id.*

<sup>5</sup> *Reed v. Jackson*, 1 East, 355.

<sup>6</sup> *Laybourn v. Crisp*, 4 M. & W. 325, 326, per *Ld. Abinger*.

issuing out of the Court of Exchequer to ascertain the extent of the Crown lands.”<sup>1</sup>

§ 626. Decrees and orders of all competent tribunals stand upon the same footing as verdicts;<sup>2</sup> and, therefore, orders of the commissioners of sewers requiring landowners to repair sea-walls, will, on an issue respecting the liability of a party to make such repairs, be evidence as adjudications by a court of competent jurisdiction; and the fact that they have been duly executed and acted upon will be presumed, if they are of an ancient date.<sup>3</sup> To render decrees of the old Court of Chancery admissible, it is unnecessary to put in the depositions to which they refer; because, in equity, the judge must have collected the questions in dispute from the bill and answer only.<sup>4</sup> Still, a decree, to be evidence, must be *final*; and mere *interlocutory orders*, not involving any judgment upon the rights of the parties, cannot be received.<sup>5</sup> So anxious are the courts to confine this species of evidence within strict limits, that they have rejected an award in a suit *inter alios*, though the cause was referred by order of the judge at *Nisi Prius*.<sup>6</sup> It seems scarcely necessary to add, that no mere *claim* to the possession of lands, not followed by judgment, will be admissible in evidence,<sup>7</sup> nor can any verdict, judgment, decree, or order, be received, if it appear that the parties pronouncing it were acting without legal authority.<sup>8</sup>

§ 627. Although judgments and decrees, when tendered as evidence of reputation, must in general be proved either by producing the originals, or by examined, or now by office,<sup>9</sup> copies, yet occasionally a copy of a less authentic character will be received,

<sup>1</sup> 13 M. & W. 313, 331, per Parke, B.

<sup>2</sup> See *Laybourn v. Crisp*, 4 M. & W. 326, per Parke, B.; *D. of Devonshire v. Neill*, 2 L. R. Ir. 153, per Palles, C. B.

<sup>3</sup> *R. v. Leigh*, 10 A. & E. 398; *D. of Devonshire v. Neill*, 2 L. R. Ir. 132, 152, 153.

<sup>4</sup> *Laybourn v. Crisp*, 4 M. & W. 320, 326, 327. It seems that the depositions may be read by the opposite party as *his* evidence, *id.*

<sup>5</sup> *Pim v. Currell*, 6 M. & W. 234, 265—267.

<sup>6</sup> *Evans v. Rees*, 10 A. & E. 151; 2 P. & D. 627, S. C.; *R. v. Cotton*, 3 Camp. 444; *Wenman v. Mackenzie*, 5 E. & B. 447.

<sup>7</sup> *D. of Devonshire v. Neill*, 2 L. R. Ir. 132, 165, 166, per Palles, C. B.

<sup>8</sup> *Rogers v. Wood*, 2 B. & Ad. 245.

<sup>9</sup> Rules of Sup. Ct., 1883, Ord. XXXVII., R. 4, cited post, § 1538.

provided it has been dealt with by the party against whom it is tendered, or by those through whom he claims, either as an authentic copy, in which case it will be admissible as secondary evidence or as a paper containing a true statement of the custom or other subject-matter of reputation in dispute, in which case it will be received as primary proof. For instance, in *Price v. Woodhouse*,<sup>1</sup> which was an action of trespass by a copyholder against the lord of a manor, where the question at issue turned on the existence or non-existence of a particular manorial custom, two documents were tendered on behalf of the plaintiff. The first purported to be a copy of an old decree of the Court of Chancery in a suit between a copyholder and the lord, establishing the custom, and the court held that, inasmuch as the document had been found among the papers of a former deceased lord, that fact furnished some evidence of its having been recognised as a true copy, and they consequently allowed it to be read as secondary evidence of the decree, proof having been given of an ineffectual search for the original. They added, however, that it was inadmissible as primary evidence, since the mere circumstance of its having been deposited among the papers of the deceased lord was not such a dealing with it as to be equivalent to an admission, upon the lord's part, that it contained a true account of the customs of the manor. The second document tendered in evidence was an office copy<sup>2</sup> of another decree, and as there was some evidence to show that this had been given to a witness by the lord as proof of the customs of the manor, the court regarded it in the light of an admission, and held that it was admissible as primary evidence of those customs.

§ 628.<sup>3</sup> It now becomes necessary to consider an important qualification of the exception under discussion, which is, that *declarations, to be admissible as evidence of reputation, must have been made before any controversy arose touching the matter to which they relate*; or, as it is usually expressed, *ante litem motam*. As this qualification is not confined to matters of public and general interest, but equally governs the admissibility of hearsay evidence in matters of pedigree, it will be convenient to illustrate its operation by referring indiscriminately to both these classes of

<sup>1</sup> 3 Ex. R. 616.

<sup>2</sup> See post, § 1538.  
(3422)

<sup>3</sup> Gr. Ev. § 131, in part.



cases. Now, the ground on which the declarations of deceased persons are admitted at all, is, that they are the natural effusions of a party who is presumed to know the real facts, and to speak upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.<sup>1</sup> But no man is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on the one side or the other; their minds are in a ferment; and, if they are disposed to speak the truth, facts are often seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *ex parte* declarations, even those upon oath, are rejected, if they can be referred to a date subsequent to the beginning of the controversy.<sup>2</sup>

§ 629.<sup>3</sup> This rule of evidence was familiar in the Roman law; § 564 but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to any earlier period of the dispute.<sup>4</sup> But in our law the term *lis* is taken in the classical<sup>5</sup> and larger sense of *controversy*; and by *lis mota* is understood the commencement of the controversy, and not the commencement of the suit.<sup>6</sup> The commencement of the controversy was, at one time, further defined by Mr. Baron Alderson to be “the arising of that state of facts, on which the claim is founded, without anything more;”<sup>7</sup> but this dictum,—though afterwards upheld by Lord Cottenham,<sup>8</sup>—has since been overruled,<sup>9</sup> and

<sup>1</sup> Per Ld. Eldon, in *Whitlocke v. Baker*, 13 Ves. 514; *R. v. Cotton*, 3 Camp. 446, per Dampier, J.

<sup>2</sup> *Berkeley Peer.*, 4 Camp. 401, 409, 413; *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 160, 161; *Richards v. Bassett*, 10 B. & C. 657.

<sup>3</sup> Gr. Ev. § 131, in part.

<sup>4</sup> *Lis est, ut primum in jus, vel in iudicium ventum est; antequam in iudicium veniatur, controversia est, non lis.* Cujac. Op. Posth. tom. 5, col. 193, B., & col. 162, D. *Lis inchoata est ordinata per libellum, et satisfactionem, licet non sit lis contestata.* Corpus Juris Glossatum, tom. 1, col. 553, ad Dig. lib. iv. tit. 6, l. 12. *Lis mota censetur, etiamsi solus actor egerit.* Calv. Lex., Verb. *Lis mota*.

<sup>5</sup> “Philosophi ætatem in litibus conerunt.”—Cic.; cited by Lawrence, J., in *Berkeley Peer.*, 4 Camp. 411.

<sup>6</sup> Per Sir J. Mansfield, in *Berkeley Peer.*, 4 Camp. 417; *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 161.

<sup>7</sup> *Walker v. Beauchamp*, 6 C. & P. 552, 561.

<sup>8</sup> *Davies v. Lowndes*, 7 Scott, N. R. 198; 6 M. & Gr. 517, S. C.

<sup>9</sup> *Shedden v. Att.-Gen. & Patrick*, 30 L. J., Pr. & Mat. 217; 2 Swab. & (3423)

it is now decided, that "there must be, not merely facts which may lead to a dispute, but a *lis mota*, or suit, or controversy preparatory to a suit, actually commenced, or dispute arisen, and that upon the very same pedigree or subject-matter which constitutes the question in litigation."<sup>1</sup>

§ 630. It follows from the above explanation of *lis mota*, first, § 565 that declarations will not be rejected, in consequence of their having been made *with the express view of preventing disputes*; secondly, that they are admissible, if no dispute has arisen, though made in *direct support of the title* of the declarant; and, thirdly, that the mere fact of the declarant having stood, or having believed that he stood, in *pari jure* with the party relying on the declaration, will not render his statement inadmissible. In support of the first proposition, the Berkeley Peerage case may be referred to, where the judges unanimously held,—in conformity with an earlier opinion expressed by Lord Mansfield,<sup>2</sup>—that an entry made by a father in any book, for the express purpose of establishing the legitimacy of his son at the time of his birth, in case the same should be called in question, will be receivable in evidence, notwithstanding the professed view with which it was made.<sup>3</sup> This doctrine has since been sanctioned by Lords Brougham<sup>4</sup> and Cottenham in England,<sup>5</sup> and by Lord St. Leonards in Ireland,<sup>6</sup> and may now be considered as established law in both countries. A leading decision in support of the second proposition is the case of *Doe v. Davies*,<sup>7</sup> where the court observed, that although a feeling of interest will often cast suspicion of

Trist. 170, S. C.; *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 335, 344—349, 1 Drury, Ch. R. 120, 140—155, S. C.

<sup>1</sup> *Davies v. Lowndes*, 7 Scott, N. R. 214, per *Ld. Denman*; 6 M. & Gr. 528, S. C.; *Shedden v. Att.-Gen. & Patrick*, 30 L. J., Pr. & Mat. 217; 2 Swab. & Trist, 170, S. C.; *Berkeley Peer.*, 4 Camp. 401; *Slaney v. Wade*, 1 Myl. & Cr. 338, 358. See *Butler v. Mountgarret*, 7 H. of L. Cas. 633; *Frederick v. Att.-Gen.*, 44 L. J., Pr. & Mat. 1; *Law Rep.*, 3 P. & D. 270, S. C.

<sup>2</sup> *Goodright v. Moss*, 2 Cowp. 591.

<sup>3</sup> 4 Camp. 418.

<sup>4</sup> *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 147, 160, 161, 164.

<sup>5</sup> *Slaney v. Wade*, 1 Myl. & Cr. 338.

<sup>6</sup> *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 335, 344—349.

<sup>7</sup> 10 Q. B. 314, 325.

declarations, it has never been held to render them inadmissible. The third proposition is equally clear law: for, although one peerage case appears at first sight to throw some doubt upon the subject,<sup>1</sup> yet it is highly probable that the pedigree was there rejected, not as having been made by a party while standing in the same situation as the claimant, but as having been concocted by such person in direct contemplation of himself laying claim to the dignity.

§ 631. But even if the case be not susceptible of this explanation, a single isolated decision can scarcely controvert a rule of law, which has been sanctioned and acted upon by numerous judges,<sup>2</sup> and which is so founded on reason, that a contrary doctrine would go far towards excluding all evidence of reputation. For instance, in cases of public and general interest, the rejection of such evidence would be wholly inconsistent with the rule, which requires the statement to have been made by some person having competent knowledge of the subject;<sup>3</sup> and in cases of pedigree, though the result of excluding declarations of persons in *pari jure* would not be equally mischievous, it would frequently have the effect of drying up sources of information, which would be highly valuable in the investigation of truth. In any one of the three classes of declarations just mentioned, it is very possible that the declarant may have had some secret wish or bias, which may have induced him to make a statement either partially or totally false; but the same observation might apply to all evidence of this nature, and its weight in each particular case must be determined by the jury. § 566

§ 632.<sup>4</sup> That clause of the rule under consideration, which re- § 567

<sup>1</sup> Zouch Peer., Pr. Min. 207.

<sup>2</sup> *Moseley v. Davies*, 11 Price, 162, 179, per Graham, B.; *Harwood v. Sims*, Wightw. 112; *Deacle v. Hancock*, 13 Price, 236, 237; *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 159, 160, per Ld. Brougham; *Freeman v. Phillipps*, 4 M. & Sel. 486, 491, per Ld. Ellenborough cited with approbation by Ld. Lyndhurst, C. B., in *Davies v. Morgan*, 1 C. & J. 593, 594; *Nicholls v. Parker*, 14 East, 331, n.; *Doe v. Tarver*, Ry. & M. 141, 142, per Abbott, C. J.

<sup>3</sup> Ante, §§ 610, 611.

<sup>4</sup> Gr. Ev. § 132, in part.

quires that the dispute should have related to *the particular subject in issue*, is based on sound sense ; for, although the existence of *such* a controversy may reasonably be expected to render turbid the fountain of evidence, the mere discussion of other topics, however similar they may be in their general nature to the real matter in dispute, does not necessarily lead to the inference that that matter was controverted, and therefore is not deemed sufficient to exclude declarations made during that discussion as evidence of reputation. Thus, in a suit between a copyholder and the lord, where the point in issue was, whether a certain customary fine was to be assessed by the jury of the lord's court, depositions taken in an ancient suit against a former lord, where the controversy turned on the *amount* of such fine, in which depositions the fine was mentioned as assessable by the lord, were admitted as evidence to negative the existence of any custom for the jury to interfere.<sup>1</sup> In that case, one of the learned judges observed, that "the distinction had been correctly taken, that where the *lis mota* was on the very point, the declarations of persons would not be evidence ; because you cannot be sure, that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and, consequently, the objection does not apply."<sup>2</sup>

§ 633. It is not, however, necessary that the former controversy § 568 should have been between the same parties, or should have related to the same property or claim, provided it appears that the matters, respecting which the declarations offered in evidence on the second trial were made, were in the former dispute really under discussion ; and, therefore, in the *Berkeley Peerage* case,—where the question before the Committee of Privileges respected the legitimacy of the claimant, and this turned on the fact whether his

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<sup>1</sup> *Freeman v. Phillipps*, 4 M. & Sel. 486.

<sup>2</sup> *Id.* 497, per Bayley, J. See, also, *Gee v. Ward*, 7 E. & B. 509 ; *D. of Devonshire v. Neill*, 2 L. R. Ir. 156, per Palles, C. B.

parents, who had gone through the ceremony of a marriage after his birth, and had subsequently had several children, had likewise been privately married two years before he was born;—a deposition of the father, wherein he swore positively to the fact of the first marriage, was rejected, it having been taken some years before, in a suit instituted by the claimant and three of his brothers born before the second marriage against the other children born after that event, for the purpose of perpetuating the testimony of the legitimacy of the former, who claimed in that character to be entitled in remainder to an estate then held by the father.<sup>1</sup> So, in the Sussex Peerage case, where the claimant, Colonel d'Este, was required to prove that his parents the Duke of Sussex and Lady Augusta Murray, were legally married, declarations contained in the Duke's will and affirming most solemnly the fact of marriage, as also statements to the same effect made by his Royal Highness in conversation, were rejected; it appearing that some years previously to such declarations and statements being made, a suit had been instituted by the Crown to annul the Prince's marriage, and it not being shown, as in truth it could not be, that that marriage was not the very marriage on which the claimant relied.<sup>2</sup>

§ 634. It is now finally decided, that declarations, made after § 569 the controversy has originated, are in all events to be excluded, even though proof be offered that the *existence of the controversy was not known* to the declarant.<sup>3</sup> This rule may, no doubt, at times operate oppressively; but its justification, if it can be justified, must rest on the ground, that, "If an inquiry were to be instituted in each instance, where the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced."<sup>4</sup>

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<sup>1</sup> 4 Camp. 401.

<sup>2</sup> 11 Cl. & Fin. 85, 99—103.

<sup>3</sup> *Shedden v. Att.-Gen. & Patrick*, 30 L. J., Pr. & Mat. 217; 2 Swab. & Trist. 170, S. C.

<sup>4</sup> *Berkeley Peer.*, 4 Camp. 417, per Sir J. Mansfield.

## CHAPTER IX.

## MATTERS OF PEDIGREE.

§ 635. QUESTIONS OF PEDIGREE form the *second* exception to § 571 the general rule rejecting hearsay evidence. This exception has been recognised on the ground of necessity; for as, in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial and were known but to few persons, it is obvious that the strict enforcement of the ordinary rules of evidence in cases of this nature would frequently occasion a grievous failure of justice. Courts of law have therefore so far relaxed these rules in matters of pedigree, as to allow parties to have recourse to traditional evidence; often the sole species of proof which can be obtained. Still, it is not considered safe to admit such evidence without qualification; and though it was long doubtful whether the declarations of servants, friends, and neighbours, might not be received, the settled rule of admission is now restricted to hearsay proceeding from persons who were *de jure related by blood or marriage* to the family in question, and who, consequently, may be supposed to have had the greatest interest in seeking, the best opportunity for obtaining, and the least reason for falsifying, information on the subject.<sup>1</sup>

§ 636. So far as blood relations are concerned, no limitation in § 573 the above rule has ever been recognised;<sup>2</sup> but with regard to

<sup>1</sup> Johnson v. Lawson, 2 Bing. 86; 9 Moore, 183, S. C.; Crease v. Barrett, 1 C. M. & R. 928; Vowles v. Young, 13 Ves. 147, per Ld. Erskine; Goodright v. Moss, 2 Cowp. 594, per Ld. Mansfield, as explained by Ld. Eldon in White-locke v. Baker, 13 Ves. 514; Monkton v. Att.-Gen., 2 Russ. & Myl. 159, per Ld. Brougham; Stafford Peer. 1823, Pr. Min. p. 4; Jewell v. Jewell, 1 Howard, S. Ct. R. 231; 17 Pet. 213, S. C.; Jackson v. Browner, 18 Johns. 37; Chapman v. Chapman, 2 Conn. 347; Waldron v. Tuttle, 4 New Hamp. 371.

<sup>2</sup> Davies v. Lowndes, 7 Scott, N. R. 188, per Parke. B.; Shrewsbury Peer., 7 H. of L. Cas. 23, per Ld. Wensleydale.

relationship by affinity, some lawyers used to imagine that the rule was confined to declarations by a husband respecting the state of his wife's family.<sup>1</sup> It is now however distinctly decided, that this view of the law is too narrow, and that no valid argument can be urged against the admissibility of a wife's declarations concerning her husband's relatives.<sup>2</sup> Still, the law will not be further relaxed, even in favour of statements made by the wife's father;<sup>3</sup> and so strictly has the limitation of the rule been enforced in modern times, that the declaration of an *illegitimate* member of a family, asserting that one of his natural brothers had died without issue, has been rejected.<sup>4</sup> So, also, the court has refused to admit a declaration by one brother that another brother has had an illegitimate son.<sup>5</sup> In an older case,<sup>6</sup> where the question was whether an elder son, who had taken possession of the paternal estates, and conveyed them to one of the litigants, was born in wedlock, his own declaration that he was a bastard, though made subsequently to the conveyance, was, after his death, received by Mr. Justice Le Blanc. The learned judge appears to have considered this statement admissible, "as the representation of one of the family of the degree of relationship he bore to it;" but if the case just cited be law,—as it would probably be deemed at the present day,—the decision can scarcely rest upon that ground, unless the special circumstances of the case be prayed in aid; and it be contended, that, since the defendant's claim rested on the legitimacy of the vendor, he could not object to the vendor's declaration, without relinquishing the only prop of his title. Should this refined argument be deemed inconclusive, perhaps the admissibility of the declaration might be sustained, on the ground that the cause turned, not only on the condition of the father's family, but on the actual status of the declarant himself; but here we are met by the difficulty, that the son could only have known the fact of his own illegitimacy by information

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<sup>1</sup> *Davies v. Lowndes*, 7 Scott, N. R. 188, per Parke, B.; S. C. p. 212.

<sup>2</sup> *Shrewsbury Peer.*, 7 H. of L. Cas. 23, 26.

<sup>3</sup> *Id.* 25.

<sup>4</sup> *Doe v. Barton*, 2 M. & Rob. 28, per Patteson, J. See *Doe v. Davies*, 10 Q. B. 314.

<sup>5</sup> *Crispin v. Doglioni*, 32 L. J., Pr. & Mat. 109; 3 Swab. & Trist. 44, S. C.

<sup>6</sup> *Cooke v. Lloyd*, Pea. Ev. App. xxviii., per Le Blanc, J. See *Hitchins v. Eardley*, 2 Law Rep., P. & D. 248; 40 L. J., Pr. & Mat. 70, S. C.

received from others; and, as a bastard has in the eye of the law no relatives, the hearsay must have been derived from strangers, and its admissibility might on that ground be questioned.

§ 637. On the whole, it may be considered as a point of great doubt, whether, under any circumstances, the declarations of a person deceased, asserting his own illegitimacy, can be received; excepting as admission against himself and those who claim under him by some title derived subsequently to the statements being made.<sup>1</sup> In the case referred to above,<sup>2</sup> evidence was received that the father had specified the time of his marriage, had declared his eldest son to have been born before that date, had heaped upon him opprobrious epithets implying illegitimacy, and had on his death-bed pointed to his younger son as his heir; and these declarations would seem to have been clearly admissible, if not as directly proving the bastardy of a person, who, though *de facto* his son, was *de jure* a stranger to him, at least as showing the position of the legitimate portion of his family, through whom the plaintiff claimed his title.<sup>3</sup> It may be observed, by way of caution, that had the declarations of the father been confined to a general statement that his son was illegitimate, they might possibly,—after proof of a valid marriage,<sup>4</sup>—have been rejected; for as such statements might have been made in consequence of non-access after marriage, they would seem to fall within the rule of law, which perhaps still<sup>5</sup> precludes parents from giving testimony to bastardise their issue born during wedlock.<sup>6</sup>

§ 638. If a man has once been connected with a family by marriage, the death of his wife will not dissolve that connexion, so as to render inadmissible declarations subsequently made by him; and therefore where, in a case of pedigree, a witness was asked whether

<sup>1</sup> See *R. v. Rishworth*, 2 Q. B. 487, per Wightman, J.; and *Proc. Gen. v. Williams*, 31 L. J., Pr. & Mat. 157, per Sir C. Cresswell; *S. C. nom. Dyke v. Williams*, *In re Mary Emsley*, 2 Swab. & Trist. 491.

<sup>2</sup> See n. <sup>6</sup>, ante, p. 561.

<sup>3</sup> See *Goodright v. Moss*, 2 Cowp. 593, 594, per *Ld. Mansfield*; *Murray v. Milner*, 48 L. J., Ch. 775, per *Fry, J.*

<sup>4</sup> *Murray v. Milner*, 48 L. J., Ch. 775, per *Fry, J.*; *L. R.*, 12 Ch. D. 849, *S. C.*

<sup>5</sup> See post, § 950.

<sup>6</sup> *R. v. Stourton*, 5 A. & E. 180.



he had not heard a husband since deceased state, after his wife's death, that she was illegitimate, the answer was received, though the counsel declined to put the further question, whether the husband had derived his information from the wife during the coverture.<sup>1</sup> The court presumed in this case that the knowledge must have been obtained by the husband whilst he was a member of the family.<sup>2</sup>

§ 639. Again, no valid objection can be taken to evidence of this kind, on the ground that it is *hearsay upon hearsay*, provided all the declarations come from different members of the same family, or do not directly appear to have been derived from strangers. Thus, the declarations of a deceased widow, respecting a statement which her husband had made to her, as to who his cousins were,—as also the declaration of a relative, in which he asserts generally that he has *heard* what he states,—have been received. If this were not so, the main object of relaxing the ordinary rules of evidence would be frustrated, since it seldom happens that the declarations of deceased relatives embrace matters within their own personal knowledge.<sup>4</sup> Even *general repute in the family*, proved by the testimony of a surviving member of it, has been considered as falling within the rule.<sup>5</sup> Moreover, it is not necessary to show that the declarations were contemporaneous with the events to which they relate; for, as Lord Brougham has well observed, such a restriction “would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence;” and, to use a homely illustration,—it would even render inadmissible the state-

<sup>1</sup> *Vowles v. Young*, 13 Ves. 140, per Ld. Erskine; *Doe v. Harvey*, Ry. & M. 297, per Littleale, J. But see observations in last section.

<sup>2</sup> Per Burrough, J., in *Johnson v. Lawson*, 2 Bing. 92; 9 Moore, 194, S. C.

<sup>3</sup> *Shedden v. Att-Gen. & Patrick*, 30 L. J., Pr. & Mat. 217, 231, 232.

<sup>4</sup> *Doe v. Randall*, 2 M. & B. 20; *Monkton v. Att-Gen.*, 2 Russ. & Myl. 165, 166, per Ld. Brougham; *Slaney v. Wade*, 7 Sim. 611, per Shadwell, V.-C.; 1 Myl. & Cr. 355, S. C., per Ld. Cottenham. See *Robson v. Att-Gen.*, 10 Cl. & Fin. 500—503, and *Davies v. Lowndes*, 7 Scott, N. R. 211—213; 6 M. & Gr. 525, 527, S. C. See post, §§ 655, 656.

<sup>5</sup> *Doe v. Griffin*, 15 East, 293; B. N. P. 295; *Shedden v. Att-Gen. & Patrick*, 30 L. J., Pr. & Mat. 217, 231, 232.

ment of a deceased person as to the maiden name of his own grandmother.<sup>1</sup>

§ 640. Before a declaration can be admitted in evidence, the *relationship of the declarant with the family must be established by some proof independent of the declaration itself*;<sup>2</sup> and although, in tracing ancient pedigrees, the court would probably be satisfied with slight evidence on this head, since the connexion of the declarant with the family might be equally difficult of proof with the very fact in controversy; yet some evidence would certainly be required; for, otherwise, a stranger, by claiming alliance with a family, and then making statements respecting it, might assume to himself the power, after death, of materially altering the relative rights of its several branches.<sup>3</sup> It seems, however, unnecessary to show the exact degree of relationship that subsists between the declarant and the person respecting whom the declarations are tendered, but it will be sufficient to prove that they were in some manner connected by blood or marriage;<sup>4</sup> and if the question be whether any, or what, relationship subsists between two supposed branches of the same family, it is only necessary to establish the connexion of the declarant with either branch.<sup>5</sup> It has, indeed, been urged, that proof must be given connecting the declarant with both branches; but this proposition involves the absurdity, that if such limitation was allowed, the declarations would be superfluous, as merely tending to prove a connexion, which, by showing

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<sup>1</sup> *Monkton v. Att-Gen.*, 2 Russ & Myl. 157, 158; *Lovat Peer.*, Pr. Min. 89.

<sup>2</sup> *Monkton v. Att-Gen.*, 2 Russ. & Myl. 156, 157; *Banbury Peer.*, 2 Selw. N. P. 754, 8th ed.; per Ld. Eldon in *Berkeley Peer.*, 4 Camp. 419; *Leigh Peer.*, Pr. Min. 307; *Stafford Peer.*, 1825, Pr. Min. 5; *R. v. All Saints*, 7 B. & C. 789, per Bayley, J.; *Davies v. Morgan*, 1 C. & J. 591, per id.; *Att-Gen. v. Köhler*, 9 H. of L. Cas. 660, 669, 670, 684, 685; *Plant v. Taylor*, 7 H. & N. 211, 227, 237; *Proc-Gen. v. Williams*, 31 L. J., Pr. & Mat. 157; *S. C. nom. Dyke v. Williams*, In re Mary Emsley, 2 Swab. & Trist. 491.

<sup>3</sup> See *Doe v. Randall*, 2 M. & P. 24, per Best, C. J.

<sup>4</sup> See *Vowles v. Young*, 13 Ves. 147.

<sup>5</sup> *Monkton v. Att-Gen.*, 2 Russ. & Myl. 157, per Ld. Brougham. See *Smith v. Tebbitt*, 1 Law Rep., P. & D. 354; 36 L. J., Pr. & Mat. 35, S. C.

that the declarant was related to both branches, had already been established.<sup>1</sup>

§ 641. Though hearsay evidence is admitted in cases of pedigree, on the assumption that no better evidence can be procured, yet, the rule being once established, such evidence will not be rejected, though living witnesses might have been called to prove the very facts to which it relates.<sup>2</sup> Thus, the declarations of a deceased mother, as to the time of the birth of her son, have been received, though the father was living and was not called.<sup>3</sup> Still, if the declarant himself be alive, and capable of being examined, his declarations will be rejected;<sup>4</sup> and, consequently, it lies upon the party, who seeks to avail himself of this species of evidence, to prove the declarant's death. In a modern case of great interest in Ireland, where, in order to establish a Scotch marriage, a relative of the supposed husband had been asked at the trial what she had heard on the subject from members of the family, her answer was held by the Court of Error to have been rightly rejected, on the ground that the question had not been limited to statements made by *deceased* relatives.<sup>5</sup> Another qualification, restricting the admission of hearsay evidence in matters of pedigree, has already been pointed out and discussed in the last chapter; we allude to the rule rejecting all hearsay declarations which are made *post litem motam*.<sup>6</sup>

§ 642.<sup>7</sup> The term *pedigree* embraces not only general questions of descent and relationship, but also the particular facts of *birth*, *marriage*, and *death*, and the *times*<sup>8</sup> when, either absolutely or relatively, these events happened, provided such facts are required

<sup>1</sup> *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 157, per Ld. Brougham.

<sup>2</sup> Ph. Ev. 212.

<sup>3</sup> *R. v. Birmingham*, cited in Hubb. Ev. of Suc. 660.

<sup>4</sup> *Pendrell v. Pendrell*, 2 Str. 924.

<sup>5</sup> *Butler v. Mountgarret*, 6 Ir. Law R., N. S. 77; 7 H. of L. Cas. 633, S. C. in Dom. Proc.

<sup>6</sup> Ante, §§ 628—634; *Butler v. Mountgarret*, 6 Ir. Law R., N. S. 77; 7 H. of L. Cas. 633, S. C. in Dom. Proc.

<sup>7</sup> Gr. Ev. § 104, as to first four lines, in part.

<sup>8</sup> *Betty v. Nail*, 6 Ir. Law R., N. S. 17.

to be proved for some genealogical purpose.<sup>1</sup> All these facts, therefore, may, in any genealogical inquiry, be established by hearsay derived from relatives, though, with respect to specific dates, some doubts have been entertained as to the extent and application of the rule. Thus, on the trial of an issue out of Chancery, Chief Justice Tindal once rejected the declarations of deceased persons, which were tendered to prove the ages of their relatives, on the ground that, though admissible for the purpose of showing the relationship, they could not be received as proof of particular facts, such as the ages of parties.<sup>2</sup> The authority, however, of this decision has been much shaken; for when it was brought before Lord Brougham on a motion for a new trial, his lordship intimated a very strong opinion in favour of the admissibility of the evidence, and subsequently stated that Mr. Justice Parke and Mr. Justice Littledale, to whom he had submitted the point, entirely concurred in the view he had taken.<sup>3</sup> If to these high authorities be added several old and some modern decisions expressly in point,<sup>4</sup> the dicta of judges,<sup>5</sup> the opinions of text writers,<sup>6</sup> and the general practice of the profession, the student will probably be justified in concluding that the proposition contended for by Chief Justice Tindal is not law.

§ 643. It may be urged that, as hearsay evidence of particular facts is inadmissible in support of public rights,<sup>7</sup> the same rule should prevail in matters of pedigree; but, in the Berkeley Peerage case, Sir James Mansfield drew a distinction between these two subjects of inquiry, which appears to put the law in

<sup>1</sup> As to this proviso, see post, § 645.

<sup>2</sup> *Kidney v. Cockburn*, 2 Russ. & Myl. 168.

<sup>3</sup> Id. 170, 171.

<sup>4</sup> *Herbert v. Tuckal*, T. Ray. 84; recognised by Ld. Ellenborough in *Roe v. Rawlings*, 7 East, 290; case cited in 1 Ph. Ev. 214, from Vin. Ab., Ev. T. b. 91; *Vulliamy v. Huskisson*, 3 Y. & C., Ex. R. 82, per Ld. Abinger; *Ryder v. Malborne*, cited 2 Russ. & Myl. 169, as a decision by Littledale, J.

<sup>5</sup> Per Ld. Mansfield, in *Goodright v. Moss*, 2 Cowp. 594; per Ld. Brougham, in *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 156; per K. Bruce, V.-C., in *Shields v. Boucher*, 1 De Gex & Sm. 51; per Pollock, C. B., in *Plant v. Taylor*, 7 H. & N. 228.

<sup>6</sup> 1 Ph. Ev. 213; Hubb. Ev. of Suc. 649; 3 St. Ev. 841.

<sup>7</sup> Ante, § 617.

its proper light. "In cases of general right," said his lordship, "which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood; and the family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true."

§ 644. Still, the hearsay evidence must, it seems, be *confined* § 580 *to such facts as are immediately connected* with the question of pedigree; and declarations as to independent facts, from which the date of a genealogical event may be inferred, will probably be rejected. It is not easy to express this limitation of the rule in intelligible language, but the following cases will explain its purport. In a question of legitimacy, turning upon the time of birth, a declaration by the deceased sister of the alleged bastard's mother, stating that she had suckled the child, was tendered in evidence; and being coupled with the proof of the time when her own child was born, it tended to fix the alleged bastard's birth at a period subsequent to its parent's marriage. Mr. Baron Gurney admitted this evidence; but Lord Cottenham expressed an opinion that he was wrong in so doing.<sup>1</sup> In another case,<sup>2</sup> where the question turned on the relative seniority of three sons, born at a birth,

<sup>1</sup> 4 Camp. 415, 416.

<sup>2</sup> *Isaac v. Gompertz*, cited in Hubb. Ev. of Suc. 650.

<sup>3</sup> Vin. Ab., Ev. T. b. 91; probably referred to, as *Spadwell v. —*, by Lawrence, J., in the *Berkeley Peer.*, 4 Camp. 410.

declarations by his father that he had christened them Stephanus, Fortunatus, and Achaicus, according to the order of the names in St. Paul's First Epistle to the Corinthians,<sup>1</sup> for the purpose of distinguishing their seniority, as also declarations by an aunt, who was present at the confinement, and who, with a similar object, had tied strings round the arms of the second and third child, was admitted. The distinction between these two cases is clear. In the former, the fact of suckling the child had no direct bearing on its age or legitimacy, but was only a species of circumstantial evidence from which these facts might be inferred; whereas in the latter, the christening and the tying strings round the arms of the children were intended from the first to afford the means of ascertaining their relative seniority.

§ 645. Although, as Mr. Phillipps justly observes, "there appears to be no foundation for any distinction between cases where a matter of pedigree is the direct subject of the suit, and other cases where it occurs incidentally," yet the declarations of relatives will not necessarily be admissible whenever the birth, marriage, or death of a party forms the subject of controversy; but such proof would seem to be confined to cases which directly or indirectly involve some question of relationship, and in which the fact sought to be established by hearsay is required to be proved for some *genealogical* purpose.<sup>2</sup> For instance, if an action for use and occupation be brought by a reversioner against a tenant pour autre vie, who has held over after the death of his cestui que vie, the fact of the death must be proved by the plaintiff in the ordinary way, and the hearsay of relatives will be inadmissible.<sup>3</sup> So, in support of a plea of infancy, letters written by the deceased father of the defendant cannot be read as proof of the date of his son's birth.<sup>4</sup> So, in *R. v. Erith*,<sup>5</sup> it was distinctly held, that the declarations of a deceased

<sup>1</sup> Ch. 16, v. 17.

<sup>2</sup> 1 Ph. Ev. 216, n. 5.

<sup>3</sup> *Shields v. Boucher*, 1 De Gex & Sm. 40, per K. Bruce, V.-C. See *Smith v. Smith*, 1 L. R., 10 Eq. 273; S. C. reversed on app., 1 L. R., Ir. 206.

<sup>4</sup> *Whittuck v. Waters*, 4 C. & P. 376, per Park, J.

<sup>5</sup> *Figg v. Wedderburne*, 6 Jur. 218, per Patteson, J.; *Haines v. Guthrie*, 53 L. J., Q. B. 521, per Ct. of App.

<sup>6</sup> 8 East, 539. In this case the child was a bastard, and the declarations of his putative father would therefore have been inadmissible even on a question of pedigree, but this point was not raised. See ante, §§ 636, 637.

father as to the place where his child was born, could not be received as evidence of the birth settlement of the child.<sup>1</sup>

§ 646. The case of *R. v. Erith*<sup>2</sup> has repeatedly been cited as § 582 an authority for the proposition, that, even in a strict question of pedigree, hearsay evidence of *locality*,—or, in other words, the declarations of deceased persons respecting the *places* where their relatives were born, and where they married, resided, came from, went to, or died,—cannot be received; but certainly, as was once pointed out by Vice-Chancellor Knight Bruce,<sup>3</sup> the case decides no such point, since Lord Ellenborough carefully rested his judgment on the fact, that no question whatsoever of relationship was involved in the inquiry. Had, therefore, the evidence tendered in that case been required for any genealogical purpose, it is very possible that the Court of King's Bench would have arrived at a different conclusion; and, indeed, this may be considered as a highly probable hypothesis, inasmuch as hearsay evidence of locality has on several occasions been admitted to elucidate matters of strict pedigree.

§ 647. Thus, in *Hood v. Lady Beauchamp*,<sup>4</sup> where the question § 582 was, whether A. B., an ancestor of the declarant C., was the same person as A. B., a blacksmith, who had resided at X., a declaration by C. that his ancestor was a blacksmith, and that he resided at X., was received in evidence by Vice-Chancellor Shadwell. So, in *Shields v. Boucher*,<sup>5</sup> Vice-Chancellor Knight Bruce, in a very ela-

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<sup>1</sup> Strenuous efforts were formerly made to render the declarations of deceased persons admissible in proof of particulars respecting their settlements; but these efforts have long since failed. See *R. v. Eriswell*, 3 T. R. 707; *R. v. Chadderton*, 2 East, 29; *R. v. Ferry Frystone*, id. 55; *R. v. Abergwilly*, id. 63.

<sup>2</sup> 8 East, 539.

<sup>3</sup> *Shields v. Boucher*, 1 De Gex & Sm. 50, 56.

<sup>4</sup> Hubb. Ev. of Suc. 468.

<sup>5</sup> 1 De Gex & Sm. 40. In this case an issue had been directed out of Chan. to ascertain the relationship of certain parties, and on the trial all the questions put in the text, except the last, had been rejected by Wilde, C. J. On a motion for a new trial, K. Bruce, V.-C., expressed his opinion that the Ch. Just. was wrong in rejecting the evidence, but it ultimately became unnecessary to decide the point. The V.-Chancellor's judgment is a very masterly production, and deserves an attentive perusal.

borate judgment, intimated a strong opinion, that, in a controversy merely genealogical, declarations made by a deceased person as to where he or his family came from, "of what place" his father was designated, and what occupation his father followed, would be admissible, and might be most material evidence for the purpose of identifying and individualising the person and family under discussion. Again, if it be necessary to show, that a family had relations who lived at a particular place, declarations by a deceased member of the family, that "he was going to visit his relatives at that place," will be evidence; not, indeed, that he went there, or that any person of his name lived in that neighbourhood; but as proving a tradition in the family, that they once had relations living in the place in question, which tradition, in the event of its being shown by other evidence that persons of the same name had resided there, might be important as a mode of identifying those persons with the branch of the family alluded to.<sup>1</sup> So, evidence has been received of a family tradition, that a particular individual died in India, for the purpose of connecting that individual with the family of the claimant.<sup>2</sup>

§ 648. The *forms*, under which hearsay evidence in matters of pedigree may be presented, are very numerous. First may be noticed the *oral declarations of deceased relatives*. These are clearly admissible if made ante litem motam, though they are seldom entitled to any great weight; for not only are they generally sought to be established by connexions of the family or other persons interested in the result of the litigation, but they are often recorded or remembered for the first time after the contest has arisen. In these cases the court necessarily runs considerable risk of being deceived by deliberate falsehood, for it is obviously difficult, not to say impossible, to convict a witness of perjury in narrating what he alleges that he heard in a conversation with a deceased person.<sup>3</sup> And, even assuming that the sincerity of the witness cannot reasonably be doubted, it often

<sup>1</sup> *Rishton v. Nesbitt*, 2 M. & Rob. 554, per Rolfe, B.

<sup>2</sup> *Id.* 556, citing *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 147—151.

<sup>3</sup> *Crouch v. Hooper*, 16 Beav. 184—189, per Romilly, M. R.; *Webb v. Haycock*, 19 Reav. 342, per *id.*



happens that little reliance can be placed on the accuracy of his testimony; for men, without deliberately intending to falsify facts, are extremely prone to believe what they wish, to confound what they believe with what they have heard, and to ascribe to memory what is merely the result of imagination.<sup>1</sup>

§ 649.<sup>2</sup> Next, *family conduct*,—such as the tacit recognition of a relationship, and the distribution and devolution of property,—is frequently received as evidence from which the opinion and belief of the family may be inferred, and as resting ultimately on the same basis as evidence of family tradition. For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity. Thus, in the Berkeley Peerage Case, Sir James Mansfield remarked, that, “if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.”<sup>3</sup> So, the concealment of the birth of a child from the husband,<sup>4</sup>—the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother,—and the fact that the child and its descendants assumed the name of the adulterer, and had never been recognised in the family as the legitimate offspring of the husband,—are circumstances that will go far to rebut the presumption of legitimacy, which the law raises in favour of the issue of a married woman.<sup>5</sup> Again, if the question be whether a person, from whom the claimant traces his descent, was the son of a particular testator, the fact that all members of the family appear to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show,

<sup>1</sup> Crouch v. Hooper, 16 Beav. 184—189, per Romilly, M. R.

<sup>2</sup> Gr. Ev. § 106, in part.

<sup>3</sup> 4 Camp. 416.

<sup>4</sup> Hargrave v. Hargrave, 2 C. & Kir. 701.

<sup>5</sup> Goodright v. Saul, 4 T. R. 356, per Ashhurst, J.; Morris v. Davies, 5 Cl. & Fin. 163, 241, et seq.; Banbury Peer., App. n. e to Le Marchant's Rep. of Gardner Peer., 389, 432, 433; 1 Sim. & St. 153, S. C.; R. v. Mansfield, 1 Q. B. 444; Townshend Peer., 10 Cl. & Fin. 289; Atchley v. Sprigg, 33 L. J., Ch. 345.

either that he was not the son, or at least that he had died without issue before the date of the will;<sup>1</sup> and if the object be to prove that a man left no children, the production of his will, in which no notice is taken of his family, and by which his property is bequeathed to strangers or collateral relations, is cogent evidence of having died childless.<sup>2</sup>

§ 650.<sup>3</sup> *Entries made by a parent or relation in bibles,<sup>4</sup> prayer-books,<sup>5</sup> missals,<sup>6</sup> almanacs,<sup>7</sup> or indeed in any other book, or in any document or paper,<sup>8</sup> stating the fact and date of the birth, marriage,<sup>9</sup> or death of a child, or other relation, are also received as the written declarations of the deceased persons who respectively made them. Entries in a family bible or testament will be admissible, even without proof that they have been made by a relative; for as this book is the ordinary register of families, and is usually accessible to all its members, the presumption is that the whole family have more or less adopted the entries contained in it, and have thereby given them authenticity.<sup>10</sup> This presumption, however, will not prevail in favour of an entry in any other book, however religious its character may be, but proof must be given, either that the entry was made by some member of the family,<sup>11</sup> or that it has been acknowledged or treated by a relative*

<sup>1</sup> Tracy Peer., 10 Cl. & Fin. 100, per Ld. Campbell; Robson v. Att.-Gen., id. 498—500, per Ld. Cottenham. See ante, § 620, ad fin.

<sup>2</sup> Hungate v. Gascoigne, 2 Phill. 25; 2 Coop. 414, S. C.; De Roos Peer., 2 Coop. 540.

<sup>3</sup> Gr. Ev. § 104, in part.

<sup>4</sup> Berkeley Peer., 3rd quest., 4 Camp. 401.

<sup>5</sup> Leigh Peer., Pr. Min. 310.

<sup>6</sup> Slane Peer., Pr. Min. pt. 2, p. 49; 5 Cl. & Fin. 41, S. C.

<sup>7</sup> Herbert v. Tuckal, T. Ray. 84.

<sup>8</sup> Berkeley Peer. 3rd quest., 4 Camp. 418. See Jackson v. Cooley, 8 Johns. 128, 131; Douglas v. Saunderson, 2 Dall. 116; Carskadden v. Poorman, 10 Watts, 82.

<sup>9</sup> In the Sussex Peer., an entry made by the mother of the claimant in her prayer-book, declaring the fact of her marriage, was admitted in evidence, 11 Cl. & Fin. 85, 98.

<sup>10</sup> Berkeley Peer., 4 Camp. 421, per Lds. Ellenborough and Redesdale; Monkton v. Att.-Gen., 2 Russ. & Myl. 162, 163, per Ld. Brougham; Hubbard v. Lees. 35 L. J., Ex. 169; 1 Law Rep., Ex. 255; 4 H. & C. 418, S. C.

<sup>11</sup> Tracy Peer. cited Hubb. Ev. of Suc. 673; Crawford & Lindsay Peer., 2 H. of L. Cas. 558—560.

as a correct family memorial,<sup>1</sup> or, at least, if ancient, that it was made at the time when it purports to have been written. In order to establish this last fact, the evidence of skilled witnesses, conversant with manuscripts of different ages, is admissible, though, as before observed, such evidence is entitled to very little weight.<sup>2</sup>

§ 651.<sup>3</sup> Again, the correspondence of deceased members of the family,<sup>4</sup> will, on proof of the handwriting, be received,<sup>5</sup> as will also, *recitals in marriage settlements*,<sup>6</sup> and other *family deeds*,<sup>7</sup> *descriptions in wills*,<sup>8</sup> and the like. Even a cancelled will, which did not appear to have been ever acted upon, has been admitted, on proof that it was found among the papers of a descendant of the testator, who seemed to have kept it as containing statements relative to the family.<sup>9</sup> So, recitals of descent, and descriptions of parties, in deeds other than family instruments, will be received, provided the deeds come from the proper custody, and are proved, or may from age be presumed, to have been executed by some member of the family to which the statements refer.<sup>10</sup> But the execution of the deed by a relation is an indispensable requisite; and therefore, where an indenture of assignment, which recited that the assignee was the son of certain parties, was executed alone by the assignor,

<sup>1</sup> Hood v. Beauchamp, 8 Sim. 26.

<sup>2</sup> Tracy Peer., 10 Cl. & Fin. 154; ante, § 50.

<sup>3</sup> Gr. Ev. § 104, in part.

<sup>4</sup> Huntingdon v. Peer., Att.-Gen.'s Rep. 357; Kidney v. Cockburn, 2 Russ. & Myl. 168; Leigh Peer., Pr. Min. pt. 2, p. 140; Hastings Peer., Pr. Min. 196. See Butler v. Mountgarret, 6 Ir. Law R., N. S. 77; 7 H. of L. Cas. 633, S. C.

<sup>5</sup> Marchmont Peer., Pr. Min. 345, 353. See Airth Peer., Pr. Min. 105.

<sup>6</sup> Neal v. Wilding, 2 Str. 1151; De Roos Peer., 2 Coop. 541, 542; Chandos Peer., Pr. Min. 27; Stafford Peer., Pr. Min. 110; Zouch Peer., Pr. Min. 276; Devon Peer., by Nicolas, 1832, App. pp. 44, 46; Lisle Peer., Pr. Min. 116, 127; Banbury Peer., Pr. Min. 6, 117; Vaux Peer., Pr. Min. 44; Huntley Peer., Pr. Min. 15; Roscommon Peer., Pr. Min. 36.

<sup>7</sup> Smith v. Tebbitt, 1 Law Rep., P. & D. 354; 36 L. J., Pr. & Mat. 35, S. C.

<sup>8</sup> Vulliamy v. Huskisson, 3 Y. & C., Ex. R. 82, per Ld. Abinger; De Roos Peer., 2 Coop. 540, 541; Lisle Peer., by Nicolas, 51, 53.

<sup>9</sup> Doe v. Pembroke, 11 East, 504.

<sup>10</sup> Marmyon Peer., Pr. Min. 111; Hastings Peer., Pr. Min. 200; Borthwick Peer., Pr. Min. 62; Hungate v. Gascoigne, 2 Coop. 407, 417; De Roos Peer., id. 541, 542. See Stokes v. Dawes, 4 Mason, 268.

who was not a member of the family, it was rejected;<sup>1</sup> and a similar fate attended a deed of conveyance, wherein the grantors recited the death of a man's sons, who were tenants in tail male, and *declared themselves* heirs of the bodies of his daughters, who were devisees in remainder.<sup>2</sup> In regard to recitals of pedigree in old answers in Chancery, a distinction has been taken between those facts which were not, and those which were, in controversy; the former being admitted as ordinary declarations, the latter being excluded as made *post litem motam*.<sup>3</sup> Similar recitals in old bills in equity are, it seems, always inadmissible, as these last are regarded as the mere flourishes of the draughtsman.<sup>4</sup>

§ 652.<sup>5</sup> *Inscriptions on tombstones,*<sup>6</sup> coffin plates,<sup>7</sup> mural monuments,<sup>8</sup> family portraits,<sup>9</sup> engravings on rings,<sup>10</sup> hatchments,<sup>11</sup> charts of pedigree,<sup>12</sup> and the like, are also admissible. Those which are proved to have been made by, or under the direction of, a deceased relative, are admitted as his declarations. But if they have been publicly exhibited, and may therefore be supposed to have been well known to the family, their publicity supplies any defect of proof that they were declarations of deceased members of the family; and they are admitted on the ground of tacit and common assent.<sup>13</sup> It is presumed,—though this is a presumption

<sup>1</sup> *Slaney v. Wade*, 1 Myl. & Cr. 338.

<sup>2</sup> *Fort v. Clarke*, 1 Russ. 604.

<sup>3</sup> See 1 Ph. Ev. 219, 220, and the authorities there cited. See, also, *De Roos Peer.*, 2 Coop. 543, 544.

<sup>4</sup> *Boileau v. Rutlin*, 2 Ex. R. 678, per Parke, B., citing the *Banbury Peer.*, as reported in 2 Selw. N. P. 756, 10th ed. These cases appear to overrule *Taylor v. Cole*, 7 T. R. 9, n.

<sup>5</sup> Gr. Ev. § 105, in part.

<sup>6</sup> *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 163; *Goodright v. Moss*, 2 Cowp. 594.

<sup>7</sup> *Chandos Peer.*, Pr. Min. 10; *Rokeby Peer.*, Pr. Min. 4; *Lovat Peer.*, Pr. Min. 77.

<sup>8</sup> *Slaney v. Wade*, 1 Myl. & Cr. 338; *De Roos Peer.*, 2 Coop. 544, 545.

<sup>9</sup> *Camoys Peer.*, 6 Cl. & Fin. 801.

<sup>10</sup> *Vowles v. Young*, 13 Ves. 144.

<sup>11</sup> *Hungate v. Gascoigne*, 2 Coop. 414, 416.

<sup>12</sup> *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 163; *Goodright v. Moss*, 2 Cowp. 594.

<sup>13</sup> *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 163; *Davies v. Lowndes*, 7 Scott, N. R. 193, per Parke, B., who observes, "The ground upon which the inscription on a tombstone or a tablet in a church is admitted, is that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence; where a pedigree hung up in the

which is doubtless often contrary to the fact,<sup>1</sup>—that the relatives of a family would not permit an erroneous inscription to remain; and that a person would not knowingly wear a ring which bore a mis-statement upon it.<sup>2</sup> Doubts appear to have been entertained at *Nisi Prius* respecting the admissibility of an inscription on a tombstone in a burial-ground for *dissenters*;<sup>3</sup> but it is submitted that such doubts are wholly groundless; for not only has this species of evidence been admitted by the House of Lords in peerage claims,<sup>4</sup> but inscriptions on *foreign* monuments have also been received.<sup>5</sup>

§ 653.<sup>6</sup> Mural and other funereal inscriptions are provable, § 588 as already shown,<sup>7</sup> by *copies*, or other secondary evidence. Their value as evidence depends much on the authority under which they were set up, and on the distance of time between their erection and the events which they commemorate.<sup>8</sup> If parol testimony of their contents be offered, on the ground that the original monuments are destroyed or effaced, the court will not be satisfied, unless the prior existence of the monuments, and the genuineness of the inscriptions, be established in the very strongest manner that the circumstances of the case will admit.<sup>9</sup> The case with which evidence of

family mansion is received, it is on the ground of its recognition by the members of the family."

<sup>1</sup> Some remarkable mis-statements on monuments are mentioned in 1 Ph. Ev. 222, and n. 4. The author of the present work once saw inscribed on a monument in one of the London cemeteries, erected to the memory of a young lady, this startling announcement—"The victim of a mother's temper." Sed. qu.

<sup>2</sup> Per Ld. Erskine, in *Vowles v. Young*, 13 Ves. 144.

<sup>3</sup> *Whittuck v. Waters*, 4 C. & P. 375, per Park, J.

<sup>4</sup> *Say and Sele Peer.*, Serg. Hill's Collect. in Linc. Inn Library, vol. 26, p. 173.

<sup>5</sup> *Hastings Peer.*, Pr. Min. 197; *Perth Peer.*, 2 H. of L. Cas. 874, 876.

<sup>6</sup> Gr. Ev. § 105, in part as to first five lines.

<sup>7</sup> Ante, § 438; and see *Tracy Peer.*, 10 Cl. & Fin. 164, 165; *Roscommon and Leigh Peer.*, cited Hubb. Ev. of Suc. 692; *Slaney v. Wade*, 1 Myl. & Cr. 338; 7 Sim. 595, S. C. cor. V.-Ch.; *Perth Peer.*, 2 H. of L. Cas. 874, 876.

<sup>8</sup> *Athenry Peer.*, Pr. Min. 45; *Vaux Peer.*, Pr. Min. 129; *Fitzwalter Peer.*, Pr. Min. 34.

<sup>9</sup> *Tracy Peer.*, 10 Cl. & Fin. 154, 181, 182, 189, 192. See *Shrewsbury Peer.*, 7 H. of L. Cas. 27.

this nature can be manufactured, and the difficulty of disproving it so as to fix the witnesses with perjury, show the necessity of enforcing this rule with more than ordinary strictness.

§ 654. Though the publicity of a document or inscription is a strong fact from which a family *recognition* of its truth may be presumed, yet a similar presumption may arise from other circumstances; and, therefore, if a document, though privately kept, is clearly proved to have been preserved by members of the family as an authentic memorial of their pedigree, it will be receivable in evidence without proof of its origin.<sup>1</sup> The mere production, however, of a document from among the family archives,<sup>2</sup> and, *a fortiori*, its production from a museum, or other public place of deposit,<sup>3</sup> will not be sufficient to render it admissible, without proof that it was made or recognised by some member of the family.

§ 655. The question how far a pedigree, purporting to have been *compiled*, either wholly or in part, from *registers* and other documents which are *not shown to have been lost*, is admissible, has been much discussed. The point arose in the case of *Davies v. Lowndes*,<sup>4</sup> where a Welsh pedigree, which was proved to be in the handwriting of one of the ancestors of the defendant, was offered in evidence, it being produced from the proper custody. The document traced the genealogy of the family from a remote and almost fabulous antiquity, and brought down the descent to the immediate contemporary relatives of the writer. At the foot of it was a memorandum in these words: "Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another, to Thomas Lloyd, Esq., of Cwm Gloyne, this 4th day of July, A. D. 1733, by his loving kinsman, Wm. Lloyd." The counsel for the demandant contended that the entire document was admis-

<sup>1</sup> *Vaux Peer.*, Pr. Min. 62; *Camoy's Peer.*, 6 Cl. & Fin. 801—803.

<sup>2</sup> *Fitzwalter Peer.*, Pr. Min. 45; *Lovat Peer.*, Pr. Min. 81; *D. of Devonshire v. Neill*, 2 L. R. Ir. 157—160, per Palles, C. B.

<sup>3</sup> *Chandos Peer.*, Pr. Min. 11. <sup>4</sup> 5 Bing. N. C. 167; 7 Scott, 21, S. C.

sible, or at least such parts of it as showed the relationship of those persons who were described by the framer as then living, and who might therefore be presumed to be personally known to him; but the Court of Common Pleas rejected the whole, apparently on the ground that the memorandum bore upon the face of it a sort of certificate, that the statement in the pedigree was merely secondary evidence of existing originals from which it was compiled, and that the absence of those originals was not accounted for; and that if any part of the pedigree was derived from legitimate sources, viz., personal knowledge or family tradition, it did not appear distinctly which was such part, and therefore the whole was inadmissible.<sup>1</sup>

§ 656. The case was then brought before the Exchequer Chamber, and the conclusion at which the court arrived, after much doubt and full consideration, was that part, if not all, of the pedigree was receivable in evidence. Lord Denman, in pronouncing the judgment of the court, observes, that "a pedigree, whether in the shape of a genealogical tree or map, or contained in a book, or mural or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is this admitted? It may be that the simple act of recognition of the document, and consequent acknowledgment of the relationship stated in it, by a member of the family, is some evidence of that relationship, *from whatever sources his information may have been derived*, because he was likely, from his situation, to inquire into the truth of such matters, and from his means of knowledge, to ascertain it."<sup>2</sup> His lordship, after referring to the language of Lords Brougham<sup>3</sup> and Cottenham,<sup>4</sup> and of the Vice-Chancellor of England,<sup>5</sup> as giving great countenance to the opinion, that the recognition by a relative of a statement of relationship is evidence of the truth of that statement,—adds, "If

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<sup>1</sup> Per Ld. Denman, in *Davies v. Lowndes*, 7 Scott, N. R. 211; 6 M. & Gr. 525, S. C.

<sup>2</sup> 7 Scott, N. R. 211, 212; 6 M. & Gr. 525, 526, S. C.

<sup>3</sup> *Monkton v. Att-Gen.*, 2 Russ. & Myl. 156.

<sup>4</sup> *Slaney v. Wade*. 1 Myl. & Cr. 355.

<sup>5</sup> *Slaney v. Wade*, 7 Sim. 611.

this be a correct view of the law, the pedigree in question was admissible, because it was certainly acknowledged by Wm. Lloyd to be correct." The judgment then continues thus:—"But the reason why a pedigree, when made or recognised by a member of a family, is admissible, may be, that it is presumably made or recognised by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased member of what the latter knew, or heard from other members who had lived before his time. And if so, it may well be contended, that, if the facts rebut that presumption, and show that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected; and so also if there be some, but an uncertain and undefined part, derived from improper sources. But when the framer speaks of individuals, whom he describes as living, we think the reasonable presumption is that he knew them, and spoke of his own personal knowledge, and not from reference to registers, wills, monumental inscriptions, and family records or history; and, consequently, to that extent, the statements in the pedigree are derived from a proper source, and are good evidence of the relationship of those persons."<sup>1</sup>

§ 657. *Armorial bearings*, whether carved on wood, painted on glass, engraved on monuments or seals, or otherwise emblazoned, are also admissible in cases of pedigree; not only as tending to prove that the person who assumed them was of the family to which they of right belonged, but as illustrating the particular branch from which the descent was claimed, or as showing, by the impalings or quarterings, the nature of the blazonry, or the shape of the shield, what families were allied by marriage, or what members of the family were descended from an illegitimate stock, or were maidens, widows, or heiresses.<sup>2</sup> The value of this evidence depends

<sup>1</sup> 7 Scott, N. R. 213; 6 M. & Gr. 527, S. C.

<sup>2</sup> Harl. MS. 1836, 6141; *Hervey v. Hervey*, 2 W. Bl. 877; *Chandos Peer.*, Pr. Min. 6, 24, 37, 40, 49; *Huntingdon Peer.*, by Bell, 280; *Att.-Gen.'s Rep.*, 359, S. C.; *Hastings Peer.*, Pr. Min. 313; *Co. Lit.* 27, a; *Shrewsbury Peer.*, 7 H. of L. Cas. 10; *Fitzwalter Peer.*, Pr. Min. 49; *Camoys Peer.*, Pr. Min. 58; 1 Sid. 354.



almost wholly upon its antiquity; and as, since the Revolution,<sup>1</sup> the heralds have exercised no authority in correcting usurpation, the use of armorial bearings subsequently to that date is entitled to but little, if any, weight as evidence of genealogy.<sup>2</sup> When proof of this nature is offered, some officer of the Heralds' College should be in attendance, to explain the meaning of the occult science.<sup>3</sup>

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<sup>1</sup> The date of the last Herald's visitation was 1686, and of the first was 1528. See Hubb. Ev. of Suc. 542.

<sup>2</sup> 1 Ph. Ev. 244; Hubb. Ev. of Suc. 696.

<sup>3</sup> See Chandos Peer., Pr. Min. 6, 24, 37, 40, 49. Besides the different species of evidence enumerated above, recourse may occasionally be had to the Heralds' books, inquisitions post mortem, parish books, registers, &c.; but as these are admissible, not as the hearsay evidence of relatives, but as public documents, the law respecting them will be discussed hereafter: Part iii. Chap. iv. See De Roos Peer., 2 Coop. 545—552.

## CHAPTER X.

## ANCIENT POSSESSION.

§ 658. A THIRD EXCEPTION to the rule rejecting hearsay evidence is allowed in favour of *ancient documents* when tendered in support of *ancient possession*. By the term "ancient documents," are meant documents *more than thirty years old*; and as these often furnish the only attainable evidence of ancient possession, the law, on the principle of necessity, allows them to be read in courts of justice on behalf of persons claiming under them, and against persons in no way privy to them, provided that they are not mere narratives of past events, but that they *purport* to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate. No doubt this species of proof deserves to be scrutinised with care; for, first, its effect is to benefit those who are connected in interest with the original parties to the documents, and from whose custody they have been produced; and next, the documents are not *proved*, but are only *presumed* to have constituted part of the *res gestæ*. Still, as forgery and fraud are, comparatively speaking, of rare occurrence, and as a fabricated deed will, generally, from some anachronism or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed; and, at any rate, it is deemed more expedient to run some risk of occasional deception, than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance, therefore, of evils, this kind of proof has for many years past been admitted, subject to certain qualifications, which will now be stated.<sup>1</sup> § 585

§ 659. And first, care is especially taken to ascertain the *genuineness* of the ancient documents produced; and this may in general § 594

<sup>1</sup> See 1 Ph. Ev. 273; 1 St. Ev. 67; Gr. Ev. § 141; and Best, Ev. 615.

be shown, *prima facie*, by proof that they come from the *proper custody*.<sup>1</sup> As this proof is by no means confined to documents tendered in support of ancient possession, but is required in most cases where deeds, papers, or writings are rendered admissible by any rule of law without strict proof of their authenticity, it becomes highly important to explain, with as much precision as possible, the legal meaning of the words "proper custody." The subject, therefore, will be illustrated in this place once for all, by a reference to the leading decisions which bear upon it; and attention will first be drawn to the language used by Chief Justice Tindal in the House of Lords, while pronouncing the opinion of the judges in the important case of the Bishop of Meath v. The Marquis of Winchester.<sup>2</sup>

§ 660. "Documents," said his lordship, "found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it; for *it is not necessary that they should be found in the best and most proper place of deposit*. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various, that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held

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<sup>1</sup> See ante, § 432, et seq.

<sup>2</sup> 3 Bing. N. C. 200—202; 10 Bligh, 462—464, S. C. See, also, Doe v. Samples, 8 A. & E. 154, per Patteson, J.; Doe v. Phillips, 8 Q. B. 158.

sufficiently genuine to render a document admissible, appears from all the cases.”<sup>1</sup>

§ 661. Thus, on the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had any interest in the estate.<sup>2</sup> So, a manuscript found in the Herald’s Office, enumerating the possessions of a dissolved monastery,<sup>3</sup>—a curious manuscript book, entitled the “*Secretum Abbatis*,” preserved in the Bodleian Library at Oxford, and containing a grant to an abbey,<sup>4</sup>—an old grant to a priory, brought from the Cottonian MSS. in the British Museum,<sup>5</sup>—and two ancient writings, purporting respectively to be an endowment of a vicarage and an inspeximus of the endowment under the seal of a bishop, both of which had been purchased at a sale as part of a private collection of manuscripts,<sup>6</sup>—have been held to be inadmissible, the possession of the documents being unconnected with the interest in the property.<sup>7</sup> So, also, as the registers of burials and baptisms are required by the Act of 52 G. 3, c. 146, §§ 1 & 5, to be kept by the clergyman of the parish either at his own residence or in the church, such registers, when produced from the house of the parish clerk, have, in the absence of all explanation on the subject, been rejected, as not coming from the proper custody.<sup>8</sup> So, the courts have on several occasions refused to admit terriers, which have been found among the papers of a mere landholder in the parish,<sup>9</sup> because the legitimate repository for such documents would be either the registry

<sup>1</sup> For the American authorities, see *Barr v. Gratz*, 4 Wheat. 213, 221; *Winn v. Patterson*, 9 Pet. 663—675. *Clarke v. Courtney*, 5 Pet. 319, 344; *Hewlett v. Cock*, 7 Wend. 371, 374; *Duncan v. Beard*, 2 Nott & M’C. 400; *Middleton v. Mass*, id. 55.

<sup>2</sup> 3 Bing. N. C. 201, per Tindal, C. J.

<sup>3</sup> *Ligon v. Strutt*, 2 Anstr. 601.

<sup>4</sup> *Michell v. Rabbetts*, cited 3 Taunt. 91.

<sup>5</sup> *Swinerton v. M. of Stafford*, 3 Taunt. 91.

<sup>6</sup> *Potts v. Durant*, 3 Anstr. 789; 2 Eag. & Y. 432, S. C.

<sup>7</sup> *Bp. of Meath v. M. of Winchester*, 3 Bing. N. C. 201, per Tindal, C. J.

<sup>8</sup> *Doe v. Fowler*, 19 L. J., Q. B. 15; 14 Q. B. 700, S. C.

<sup>9</sup> *Atkins v. Hatton*, 2 Anstr. 386; 3 Gwill. 1406; 4 Wood’s Decrees, 410; 2 Eag. & Y. 403, S. C.; *Atkins v. Ld. Willoughby De Broke*, 4 Wood’s Decrees, 424.

of the bishop, the registry of the archdeacon, or the church chest.<sup>1</sup> In the case of *Randolph v. Gordon*<sup>2</sup> this doctrine was carried to its extreme limit. There, the defendant, who was grandson of a former rector, produced a book, which purported to be the book of such rector; but as he did not show that he had found it among his grandfather's papers, or that it had come into his possession in a legitimate manner, it was rejected.

§ 662. On the other hand, the poor-house of a union has been § 597 considered not an improper repository for the documents of any parish within the union;<sup>3</sup> and an old chartulary of a dissolved abbey has been admitted, when found in the possession of the owner of part of the abbey lands, though not of the *principal proprietor*.<sup>4</sup> The strictly proper custody for such a document as this last would have been the Augmentation Office;<sup>5</sup> and as between the different proprietors of the abbey lands, it might naturally be supposed to have been deposited with the largest; still the court held, that its actual place of custody was one, where it might reasonably be expected to be found.<sup>6</sup> So, an old book of a collector of tithes would be equally well authenticated, whether produced from the custody of the successor, or executor, of the incumbent, or from the hands of the successor of the collector.<sup>7</sup> So, also, an unproved will, more than thirty years old, disposing of real and personal estate, and produced from the custody of a younger son of the testator, who, in common with his brothers, derived a benefit under it, has been admitted, though it was contended that it should have been deposited in the ecclesiastical court of the diocese.<sup>8</sup>

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<sup>1</sup> *Armstrong v. Hewett*, 4 Price, 216; 3 Eag. & Y. 835, S. C.; *Potts v. Durant*, 3 Anstr. 795; 3 Gwill. 1450, S. C.

<sup>2</sup> 5 Price, 312. See, also, *Manby v. Curtis*, 1 Price, 225.

<sup>3</sup> *Slater v. Hodgson*, 2 Sess. Ca. 488; 9 Q. B. 727, S. C.

<sup>4</sup> *Bullen v. Michel*, 2 Price, 399, 413; 4 Dow, 297; 4 Gwill. 1779; 3 Eag. & Y. 757, S. C. See, also, *Mytton v. Thornbury*, 29 L. J., M. C. 109; S. C. nom. *R. v. Mytton*, 2 E. & E. 557.

<sup>5</sup> Per *Ld. Redesdale*, in *Bullen v. Michel*, 4 Dow, 321.

<sup>6</sup> *Bp. of Meath v. M. of Winchester*, 3 Bing. N. C. 201, 202, per *Tindal*, C. J. <sup>7</sup> *Id.*; referring to *Jones v. Waller*, 3 Gwill. 346.

<sup>8</sup> *Doe v. Pearce*, 2 M. & Rob. 240, per *Coleridge, J.*; *Andrew v. Motley*, 12 Com. B., N. S. 526.

§ 663. When an expired lease was produced from the custody of the lessor, and proof was given that he had received it from a former occupier of the demised premises, who had paid for several years the precise rent reserved by it, and who, subsequently to the expiration of the term, had procured it from two strangers who claimed no interest in it, the court held the deed to be admissible, without proof in what manner it had come into the hands of these strangers; because, by the act of giving it up to the occupier, they admitted his right to the possession of it, and were consequently presumed to have held it on his account.<sup>1</sup> Again, a case stated for counsel's opinion by a deceased bishop, respecting his right of presentation to a living, has been admitted against a subsequent bishop of the same see, on a question touching the same right, though the paper was not found in the public registry of the diocese, but among the private family documents of the descendants of the former bishop.<sup>2</sup> So, where a mortgagee in fee brought an action of ejectment, and the defendant's case was, that the mortgagor, his father, had, previously to the mortgage, conveyed the estate to trustees in settlement, reserving to himself only a life interest, the court permitted the son to put in the deed of settlement, it being more than thirty years old, though it was produced from among the papers of his late father, against whom its provisions were intended to operate; and though it was strongly urged that the trustees or their representatives were the parties entitled to its custody; and the more especially so, as by the deed having been permitted to remain with the settlor, he had been enabled to practise a fraud on the mortgagee.<sup>3</sup>

§ 664. Some doubt exists whether the custody of a document must be proved by a sworn witness, when it purports on its face to belong to the party who tenders it in evidence. In one or two settlement cases, the respondents have been permitted to produce old certificates, which purported to have been granted to them by the

<sup>1</sup> *Rees v. Walters*, 3 M. & W. 527.

<sup>2</sup> *Bp. of Meath v. M. of Winchester*, 3 Bing. N. C. 183, 202, 203.

<sup>3</sup> *Doe, v. Samples*, 8 A. & E. 151; 3 N. & P. 254. S. C. See, also, *Bertie v. Beaumont*, 2 Price, 307; *Ld. Trimlestown v. Kemmis*, 9 Cl. & Fin. 774, 775.

appellants, without giving any account respecting their custody;<sup>1</sup> but in the case of *Evans v. Rees*, where, on a question of boundary, the plaintiff's counsel proposed to read certain manor-books without proving the custody whence they came, on the ground that they belonged to the lord, who was admitted to be the real plaintiff, the court held that they could not be read; Mr. Justice Coleridge observing, that unless some witness was sworn for the purpose of proving their custody, they might have been procured from a grocer's shop.<sup>2</sup> If, however, the witness producing the document can swear that he received it from the representative of the person originally entitled to it, as a paper which had belonged to such person, this evidence will in ordinary cases be sufficient, without calling the representative himself to explain how he became possessed of the document.<sup>3</sup>

§ 665. An able writer on the law of evidence has urged, that in order to render ancient documents admissible, proof, if possible, must be given of some *act done* with reference to them, and that, where the nature of the case does not admit of such proof, acts of modern enjoyment must at least be shown.<sup>4</sup> This doctrine, however, would seem to be advanced in somewhat too bold a manner, and to be unsupported by the current of modern decisions; for although it is perfectly true that the mere production of an ancient document, unless supported by some corroborative evidence of acting under it, or of modern possession, would be entitled to little, if any, weight, still there appears to be no strict rule of law, which would authorise the judge in withdrawing it altogether from the consideration of the jury:—in other words, the absence of proof of possession affects merely the *weight*, and not the *admissibility*, of the instrument.<sup>5</sup> § 599

§ 666 Thus, in *Rogers v. Allen*, where, in order to prove a prescriptive right of fishery as appurtenant to a manor, ancient licences to fish in the locus in quo, which appeared on the court- § 600

<sup>1</sup> *R. v. Ryton*, 5 T. R. 259; *R. v. Netherthong*, 2 M. & Sel. 337.

<sup>2</sup> 10 A. & E. 151, 154.

<sup>3</sup> *Earl v. Lewis*, 4 Esp. 1, per Heath, J. See *Doe v. Keeling*, 11 Q. B. 884.

<sup>4</sup> 1 Ph. Ev. 276, 278.

<sup>5</sup> *Malcomson v. O'Dea*, 10 H. of L. Cas. 614, 615; *Bristow v. Cormican*, 3 App. Cas. 668, per Ld. Blackburn, in H. L. (I.).

rolls, and were granted by former lords in consideration of certain rents, were tendered in evidence, Mr. Justice Heath, after argument, held that they were admissible without any proof of the rents having been paid; but he added that, to give them any *weight*, it must be shown that in latter times payments had been made under licences of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in."<sup>1</sup> So, in the case of the Duke of Bedford v. Lopes, Bart., which was an action brought to try the title to the bed of a river, after proof of a grant from Henry VIII., two counterparts of leases were produced from the Duke's muniment room, comprehending the soil in question. No payment by a tenant was proved, nor any modern act of ownership; but Lord Denman admitted the instruments as coming from the right custody, observing that no circumstance in the case threw suspicion upon them, and that "the absence of other kinds of proof was mere matter of observation."<sup>2</sup> Again, in one of the numerous ejectments brought by Lord Egremont,<sup>3</sup> it became necessary to show that the land in question had been part of the estate of the lessor's ancestor, Sir William Wyndham; and in order to establish this fact, a document was produced from the muniment room of the property inherited from Sir William, which appeared to be a counterpart of a lease of this land made by him; but it purported to be executed only by the lessee, and no proof was given of actual possession under it. The Court of Queen's Bench, after consulting with some of the other judges, held that this deed was admissible in evidence.

§ 667.<sup>4</sup> Under the above qualifications, *ancient documents* are § 601

<sup>1</sup> 1 Camp. 309, 311; Malcomson v. O'Dea, 10 H. of L. Cas. 593, 616.

<sup>2</sup> Cited in argument, 3 Q. B. 623.

<sup>3</sup> Doe v. Pulman, 3 Q. B. 622, 626. See, further, Clarkson v. Woodhouse, 5 T. R. 413, n., per Ld. Mansfield; 3 Doug. 189, S. C.; Brett v. Beales, M. & M. 418, per Ld. Tenterden; Tisdall v. Parnell, 14 Ir. Law R., N. S. 123; Doe v. Passingham, 2 C. & P. 444, per Burrough, J.; Ranciffe v. Parkyns, 6 Dow, 202, per Ld. Eldon; McKenire v. Fraser, 9 Ves. 5; Jackson v. Blanshan, 3 Johns. 292, 297, 298; Crowder v. Hopkins, 10 Paige, 190; Jackson v. Luquere, 5 Cowen, 221, 225; Jackson v. Lamb, 7 id. 431; Barr v. Gratz, 4 Wheat. 213, 221; Hewlett v. Cock, 7 Wend. 371, 373, 374.

<sup>4</sup> Gr. Ev. § 144, in great part.



receivable as evidence that the transactions to which they relate actually occurred. And though they are usually spoken of as hearsay evidence of ancient possession, and, as such, are said to be admitted in exception to the general rule; yet they seem rather to be parts of the *res gestæ*, and therefore admissible as original evidence, on the principle already discussed.<sup>1</sup> An ancient deed, which has nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead;<sup>2</sup> and, if found in the proper custody, and corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of property therein mentioned; because this is the usual course of such transactions. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statute may be made out from an existing *torso*, or a perfect skeleton from the fossil remains of a part.

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<sup>1</sup> Ante, § 583, et seq.

<sup>2</sup> Ante, § 87.

## CHAPTER XI.

## DECLARATIONS AGAINST INTEREST.

§ 668.<sup>1</sup> A FOURTH EXCEPTION to the rule rejecting hearsay § 602 evidence is allowed in favour of *declarations made by persons since deceased against their pecuniary or proprietary interest.*<sup>2</sup> The ground upon which this evidence is received, is the *extreme improbability of its falsehood*. The regard which men usually pay to their own interests is considered a sufficient security against any wilful mis-statement, and affords also a reasonable inference that the declarations or entries were not made under any mistake of fact, or want of information on the part of the declarant. The danger of any fraud in the statement will be still less dreaded, if it be borne in mind, that the evidence is not *receivable till after the death* of the declarant, and that if the opponent can show that the statement was made with any sinister motive, it will at once be rejected. The ordinary tests of truth, afforded by the administration of an oath and by cross-examination, are certainly here wanting; but their place is in some measure supplied by the circumstances of the declarant; and the inconveniences that would result from the exclusion of evidence, having such guarantees for its accuracy in fact and its freedom from fraud, are rightly considered much greater in general, than any which are likely to be experienced from its admission.<sup>3</sup>

§ 669. In order to render declarations against interest admissible as such, it must appear, either by proof or by presumption,<sup>4</sup> that the declarant is *dead*,<sup>5</sup> and the mere fact that he has

<sup>1</sup> Gr. Ev. § 148, in great part.

<sup>2</sup> *Sussex Peer.*, 11 Cl. & Fin. 103—114; *Higham v. Ridgway*, 10 East, 109; 2 Smith, L. C. 270, S. C.; *id.* 281, n.; *Short v. Lee*, 2 Jac. & W. 464, 488, per Plumer, M. R.

<sup>3</sup> 1 Ph. Ev. 294.

<sup>4</sup> *Doe v. Michael*, 17 Q. B. 276; ante, § 198.

<sup>5</sup> *Phillips v. Cole*, 10 A. & E. 106, 111, per Ld. Denman; *Spargo v. Brown*, (3456)

absconded abroad in consequence of a criminal charge, or that he is otherwise out of the power of the party to produce as a witness, will not be sufficient.<sup>1</sup> It would seem, also, from many of the cases, that the declarant must be shown to have had a competent, if not a peculiar, *knowledge* of the facts, which form the subject matter of the declaration;<sup>2</sup> and, indeed, in the Sussex Peerage claim, the rule was so laid down.<sup>3</sup> In all these cases, however, the "law" was "taken for granted;"<sup>4</sup> and in *Crease v. Barrett*, where the question was expressly raised, the Court of Exchequer after argument held, "that it was not necessary that the deceased person should have his own knowledge of the fact stated,—that, if the entry charged himself, the whole of it became admissible against all persons,—and that the absence of such knowledge went to the weight, and not to the admissibility, of the evidence."<sup>5</sup>

§ 670. It was long a matter of doubt in Westminster Hall, § 604 whether the absence of all interest to misrepresent, coupled with peculiar knowledge in the declarant, would not render his declarations admissible after his death:<sup>6</sup> but it is now fully determined, first, that the statement or entry must be *against the interest* of the person making it;<sup>7</sup> and, secondly, that the interest must be of a *pecuniary or proprietary nature*.<sup>8</sup> These points were decided

9 B. & C. 935; *Smith v. Whittingham*, 6 C. & P. 78. See ante, § 641, and post, § 703.

<sup>1</sup> *Stephen v. Gwenap*, 1 M. & Rob. 120, per Alderson, J.

<sup>2</sup> *Higham v. Ridgway*, 10 East, 122 per Bayley, J.; *Marks v. Lahe*, 3 Bing. N. C. 419, per Tindal, C. J.; 420, per Park, J.; 421, per Vaughan, J.; *Barker v. Ray*, 2 Russ. 76, per Ld. Eldon; *Short v. Lee*, 2 Jac. & W. 475, 488, 489, per Plumer, M. R.

<sup>3</sup> 11 Cl. & Fin. 112, per Ld. Brougham and Ld. Denman.

<sup>4</sup> As to which, see per Ld. Denman in *O'Connell v. The Queen*, 11 Cl. & Fin. 373.

<sup>5</sup> 1 C. M. & R. 925; 5 Tyr. 464, 465, S. C.

<sup>6</sup> See per Ld. Hardwicke in *Glynn v. Bk. of England*, 2 Ves. Sen. 38; per Le Blanc, J., in *Higham v. Ridgway*, 10 East, 120, 121; per Bayley, J., in *Gleadon v. Atkin*, 1 C. & M. 424; per Ld. Ellenborough in *Roe v. Rawlings*, 7 East, 290; and *Daly v. Wilson*, Milw., Ec. Ir. R. 658—660.

<sup>7</sup> *Berkeley Peer.*, Pr. Min. 655, cited and confirmed in *Sussex Peer.*, 11 Cl. & Fin. 108, 109.

<sup>8</sup> *Sussex Peer.*, 11 Cl. & Fin. 103—114; explained and acted upon by Ld.

in the Sussex Peerage case, where, in order to prove the marriage of the Duke of Sussex and Lady Augusta Murray, statements made by the clergyman, since deceased, who had married them at Rome, were tendered in evidence, on the ground that they were clearly against his interest, inasmuch as they related to an act which rendered him *liable to prosecution* while living, or which, at least, he believed to be *illegal*. Lord Chancellor Lyndhurst, in declaring his opinion that this evidence should be rejected, observed, "It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true, that because, while living, a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his death. These are not correlative nor corresponding propositions."<sup>1</sup> Lord Brougham also added, "To say, if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced."<sup>2</sup>

§ 671. The courts will not weigh with nice scales the amount of the pecuniary interest, but will admit every entry which, at the time when it was made, *completely* charged the maker to any extent.<sup>3</sup> But an incomplete charge will not be sufficient; and, therefore, an entry in the following form, "April 4th.—A. came as a servant, to have for the half year 2l.," was held to be inadmissible as a declaration against interest, the court considering it merely as a memorandum of an agreement, which must be supposed to have been made on fair terms, and was, consequently, as much in favour of the maker's interest as against it. If the master had to pay for the services, the servant had to perform

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Denman in *Davis v. Lloyd*, 1 C. & Kir. 276. See, also, *Smith v. Blakey*, 2 Law Rep., Q. B. 326; 36 L. J., Q. B. 156, 8 B. & S. 157, S. C.; *Massey v. Allen*, 49 L. J., Ch. 76; L. R., 13 Ch. D. 558, S. C.

<sup>1</sup> 11 Cl. & Fin. 110.

<sup>2</sup> Id. 111, 112. This case overrules *Standen v. Standen*, Pea. R. 45.

<sup>3</sup> *Orrett v. Corser*, 21 Beav. 52; *Richards v. Gogarty*, I. R., 4 C. L. 300.

them. Mr. Justice Coleridge observed, that "this was not an entry against the party's interest, unless the mere making of a contract be so; and if that were the case, the existence of a contract would be against the interest of both parties to it."<sup>1</sup>

§ 672. It is now determined both with reference to this excep- § 606  
tion, and also to that which relates to declarations made in the course of duty or business,<sup>2</sup> that the term "declaration" includes a mere *oral* statement, as well as a written memorandum.<sup>3</sup> The former may indeed be entitled to less weight with the jury than the latter, but the law of England recognises no distinction between statements made by word of mouth, and those made in writing, except where the writing is by deed,<sup>4</sup> or is rendered necessary by some statute.

§ 673. It is further clear that the term "declaration," as ap- § 607  
plied to the exception under discussion, embraces *all written statements*, whether made *at the time of the fact declared, or on a subsequent day*,<sup>5</sup> though the exception is most frequently exemplified by entries in books of account. Where<sup>6</sup> these are books of collectors of taxes, stewards, bailiffs, or receivers, which are subject to the inspection of others, and in which the entries are generally of money received, charging the party making them, the exception clearly applies.<sup>7</sup> But *private books*, though exclusively retained within the custody of their owners, are also admissible on the same principle; for their liability to be produced in courts of law on notice or subpoena, and the chance of their contents becoming known through accident, are deemed sufficient security

<sup>1</sup> R. v. Worth, 4 Q. B. 132, 139.

<sup>2</sup> R. v. Buckley, 13 Cox, 293.

<sup>3</sup> R. v. Birmingham, 31 L. J., M. C. 63; 1 B. & S. 763, S. C. See *Stapylton v. Clough*, 2 E. & B. 933; *Fursdon v. Clogg*, 10 M. & W. 572, 574—576; *Sussex Peer.*, 11 Cl. & Fin. 103—114. See, also, post, § 708. In *Smith v. Blakey*, 8 B. & S. 164, *Blackburn, J.*, is reported to have questioned this proposition as being "too broadly stated," but the learned Judge cited no authority in support of his view of the law, and his comment was a mere obiter dictum.

<sup>4</sup> *Bewley v. Atkinson*, 49 L. J., Ch. 153, 161, per *Thesiger, L. J.*

<sup>5</sup> *Doe v. Turford*, 3 B. & Ad. 898, per *Parke, B.*; *Short v. Lee*, 2 Jac. & W. 475, per *Plumer, M. R.*

<sup>6</sup> *Gr. Ev.* § 150, in great part.

<sup>7</sup> *Barry v. Bebbington*, 4 T. R. 514; *Goss v. Watlington*, 3 B. & B. 132; *Whitnash v. George*, 8 B. & C. 556.

against fraud;<sup>1</sup> and as the entry is not admissible, unless it either *charges the party making it* with the receipt of money on account of a third person, or *acknowledges the payment of money* due to himself, it is considered, in either of these events, as sufficiently against his interest to be brought within the exception.<sup>2</sup>

§ 674. No valid objection can be taken to the admissibility of an entry, which charges the person making it with receiving money from another, on the ground that such entry forms only a part of a *general debtor and creditor account, the balance of which is in favour of the receiver*;<sup>3</sup> for, if an action were brought against the receiver by his employer, that part of the account which charged the receiver would be evidence against him, while the entries which showed his discharge, though not absolutely inadmissible for him, would, as compared with the entries against his interest, be entitled to very little weight;<sup>4</sup> and even if it were otherwise, the admission of the receipt of money would still be against his interest, as the balance in his favour would thereby be diminished to the extent of the sum admitted.<sup>5</sup> Besides, a man is little likely to charge himself for the mere purpose of getting a discharge;<sup>6</sup> and as almost all entries, which are tendered in evidence as being declarations against interest, are inserted in accounts containing items on both sides, the objection, if it were allowed to prevail, would strike at the very root of the exception under review.<sup>7</sup>

§ 675. Whether an entry made by a party acknowledging the payment of money as due to himself, will be admissible as a declaration against interest, in cases, where *such entry is the only evidence of the charge of which it shows the subsequent liquidation*,

<sup>1</sup> Higham v. Ridgway, 10 East, 122, per Bayley, J.; Roe v. Rawlings, 7 East, 291, per Ld. Ellenborough; Middleton v. Melton, 10 B. & C. 317.

<sup>2</sup> See Foster v. M'Mahon, 11 Ir. Eq. R. 287, 299—302.

<sup>3</sup> Rowe v. Brenton, 3 M. & R. 267, 268; Williams v. Geaves, 8 C. & P. 592, per Patteson, J.; R. v. Worth, 4 Q. B. 134, per Coleridge, J.; Clark v. Wilmot, 1 Y. & C. Ch. R. 53.

<sup>4</sup> See 2 Smith, L. C. 286.

<sup>5</sup> See 8 C. & P. 594, per Ludlow, Serj., arguendo.

<sup>6</sup> See per Littledale, J., in Rowe v. Brenton, 3 M. & R. 268.

<sup>7</sup> See per Ld. Tenterden, in id.

is a question of more difficulty, and the authorities on the subject are highly conflicting. On the one hand, two *Nisi Prius* decisions may be cited,—namely, *Doe v. Vowles*,<sup>1</sup> and *Doe v. Burton*,<sup>2</sup>—which seem distinctly to negative the admissibility of such evidence. In the first case it became necessary to show that a mortgagee, through whom the plaintiff claimed, had repaired the premises in dispute; and for this purpose, the plaintiff produced a receipted bill for the repairs, in the handwriting of a deceased carpenter, which had been found among the mortgagee's papers. An objection was raised to the reception of this paper as not containing any statement against the interest of the carpenter; since, though it showed that his demand had been paid, it furnished the only evidence that such a demand had ever existed. Mr. Justice Littledale rejected the evidence, observing, that “the cases had gone quite far enough.” In the other case the evidence tendered was of a similar nature, excepting only that, instead of being a bill and receipt, it was an entry in a deceased tradesman's book, showing that he had done certain work, and had been paid for it. Mr. Baron Gurney refused to admit this evidence, apparently relying on the authority of *Doe v. Vowles*.

§ 676. On the other hand, Lord Denman,<sup>3</sup> Lord Wensleydale,<sup>4</sup> § 610 and Sir George Jessel,<sup>5</sup> appear, on separate occasions, to have admitted such entries, and the last two very learned judges are stated to have expressly disapproved of *Doe v. Vowles*, saying that they thought it contrary in principle to *Higham v. Ridgway*.<sup>6</sup> On examining, however, the case of *Higham v. Ridgway*, it scarcely seems to furnish a safe guide on the subject; for there it *was* proved by evidence *aliunde*, that the service charged for in the account had in fact been performed; and although Lord Ellenborough first lays down the general doctrine, that “evidence was admissible upon the broad principle on which receiver's books have been admitted,—namely, that the entry made was in prejudice of the party making it,”<sup>7</sup>—he afterwards, in two different parts of his judgment,

<sup>1</sup> 1 M. & Rob. 261.

<sup>2</sup> 9 C. & P. 254.

<sup>3</sup> *R. v. Hendon*, cited *arguendo*, in 9 C. & P. 255.

<sup>4</sup> *R. v. Lower Heyford*, cited 2 Smith, L. C. 283.

<sup>5</sup> *Taylor v. Witham and Witham v. Taylor*, L. R., 3 Ch. D. 605; 45 L. J., Ch. 798, S. C.

<sup>6</sup> 10 East, 109.

<sup>7</sup> *Id.* 117.

advert to the fact, that the work, for which the charge was made, was proved to have been done by other evidence.<sup>1</sup> But still,—independent of this case,—the view of the law taken by Lords Denman and Wensleydale and the late distinguished Master of the Rolls will probably be upheld; for, although it may be urged that, while that part of an entry which is in the writer's own favour stands unconfirmed, suspicions may be entertained that the whole statement is a fiction;<sup>2</sup> an answer to this argument is found in the improbability that any tradesman would, without an assignable motive, first enter a false claim on one side of his book, and then admit its having been satisfied on the other. Moreover, as the requiring corroborative proof of the claim must tend to embarrass the trial by raising collateral issues, and as the very impossibility of obtaining such proof is often the sole cause, which renders it necessary to have recourse to the entry at all; it seems naturally to follow, that the admission of such entries ought on every ground, whether of justice or expediency, to be regarded as a less evil than their rejection.

§ 677. The case of *Higham v. Ridgway*,<sup>3</sup>—though it throws but little light on the subject discussed in the preceding section,—is highly important, as showing that entries may be received in evidence of *collateral and independent matters*, which, though forming *part of the declaration*, are *not in themselves against the interest of the declarant*. In that case, to prove on what day a child was born, the book of the accoucheur, who had attended the mother in her confinement, was produced, and as his charge for such attendance on a day specified was marked in the book as *paid*, this entry was admitted as evidence of the *date* of the birth. Lord Ellenborough, in pronouncing judgment, observes, “It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged.”<sup>4</sup> So, in *Doe v. Robson*,<sup>5</sup> the entry in a book of a deceased attorney of charges paid for a lease as drawn on a certain day, was held to be evidence that the lease was drawn on that day.

<sup>1</sup> 10 East, 117, 119.

<sup>2</sup> 2 Smith, L. C. 283.

<sup>3</sup> 10 East, 109.

<sup>4</sup> *Id.* 117.

<sup>5</sup> 15 East, 32. See, also, *In the goods of Thomas*, 41 L. J., Pr. & Mat. 32.



§ 678.<sup>1</sup> In a later case,<sup>2</sup> the judges,—while intimating an opinion, § 611 that, if the point were *res nova*, it would be more reasonable to hold that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and on what account, thus giving it the effect only of a verbal proof of the same payment,—acknowledged that the authorities had gone beyond that limit, and that the entry of a payment against the interest of the party making it, had been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it. In that case, A., B. & C. had made a joint and several promissory note for 300*l.*, and a partial payment had been made by A., which was endorsed by the payee upon the note in these terms,—“Received of A. the sum of 280*l.* on account of the within note, *the 300*l.* having been originally advanced to C.*” An action having been brought by A. to recover contribution from B. “as a co-surety,” the court held that, as the payee was dead, the indorsement was admissible evidence of the whole statement contained in it, and was consequently evidence, not only of the payment of the money, but of the fact that C. was the principal debtor; leaving the effect of such proof to be determined by the jury.

§ 679. Again, in the case of *Marks v. Laheè*,<sup>3</sup> the plaintiff, in § 612: order to prove a tender and refusal, offered in evidence two entries, which had been made by a deceased clerk of his attorney in the day-book of the office. By the first, the clerk acknowledged the receipt of 100*l.* from his employer, for the purpose of making a tender to the defendant. The second entry was as follows: “Re Colnaghi, attending Mr. Laheè; tendering him 100*l.* for each of the plates, and the etching of the Queen separately; when he declined to let me have the same, and said he had no objection to deliver up the impressions, upon the payment of the expenses of making them.” An objection was taken to the admissibility of the second entry, on the ground that it did not charge the party making it, but

<sup>1</sup> Gr. Ev. § 152, in great part.

<sup>2</sup> *Davies v. Humphreys*, 6 M. & W. 153, 166. See, also, *Percival v. Nansom*, 7 Ex. R. 1.

<sup>3</sup> 3 Bing. N. C. 408; 4 Scott, 137, S. C.

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rather discharged him, as showing that he had fulfilled his duty; that the second entry must be taken by itself, because the first did not prove the tender; and being so taken, there was nothing to show that the clerk did not tender his own money; in which case the entry contained nothing to charge him. The objection, however, was overruled, and Chief Justice Tindal observed, that if an action had been brought by the employer against the clerk for money had and received, the entry would have been material evidence to show that he had received 100*l.*, and had not disposed of it according to his instructions; so that it remained in his hands to be accounted for to the employer. In such an action the employer could not have relied on the first entry alone; but must have further shown that the object, for which the money was placed in the clerk's hands, had not been attained.<sup>1</sup> The case of *Stead v. Heaton*<sup>2</sup> carries this doctrine to the extreme verge of the law.<sup>3</sup> There, in order to establish the existence of a customary payment, two entries in the parish book were put in. The first stated the custom, and the second, which was written on the same page, was as follows:—"Received of Haworth, who this year disputed *this* our ancient custom, but afterwards paid it, 8*l.*" The court held that both entries were admissible, the latter as charging the parish officers with receipt of the money, the former as immediately preceding the latter, and being referred to in it.<sup>4</sup>

§ 680. It must not be supposed from the preceding cases, that because a document contains entries against interest, it will be admissible in proof of *independent matters*, which appear as separate items unconnected with such entries, and which, consequently, need not be read in order to explain them.<sup>5</sup> Such is not the law; and whatever doubts might once have been entertained on the subject,<sup>6</sup> it is now finally determined, that if an account be rendered by a

<sup>1</sup> 3 Bing. N. C. 419.

<sup>2</sup> 4 T. R. 669. See, also, *May. of Exeter v. Warren*, 5 Q. B. 773.

<sup>3</sup> Per Alderson, B., in *Knight v. Waterford*, 4 Y. & C., Ex. R. 294.

<sup>4</sup> See *Musgrave v. Emmerson*, 10 Q. B. 326.

<sup>5</sup> Per *Ld. Lyndhurst*, in *Rudd v. Wright*, cited 1 Ph. Ev. 314, 315; 4 Y. & C., Ex. R. 294.

<sup>6</sup> *Bullen v. Michel*, 2 Price, 399.

steward containing on one side items charging himself with the receipt of moneys, and on the other side items discharging him by showing how the moneys received had been disbursed, the discharging entries will not be admissible in evidence, unless they are necessary to explain the charging entries, or are expressly referred to by them.<sup>1</sup> For instance, in the case of *Knight v. The Marquis of Waterford*,<sup>2</sup> the accounts of a deceased steward were tendered in evidence, with the view of showing that former lords of the manor had been liable to pay poor-rates on the tithes. On one side of these accounts the steward acknowledged the receipt of rent for tithes from a tenant; and on the other side was an entry in discharge of the former item, by allowing the tenant a certain sum for poor rates on the tithes. Mr. Baron Alderson rejected the second entry, on the ground that it was not directly connected with the first item, though made about the same time; but his lordship added that, if the amount charged had been stated to be a sum less by the deduction of the opposite side of the account, it might then possibly have been admissible, on the authority of *Stead v. Heaton*.

§ 681.<sup>3</sup> In order that declarations against interest should be received in evidence, it is not necessary,—as was formerly thought,<sup>4</sup>—that the declarant should have been competent, if living, to testify to the facts contained in the declaration.<sup>5</sup> Neither is it material, so far at least as regards the *admissibility* of declarations, whether the matters stated therein are or are not provable by living witnesses who might have been called.<sup>6</sup> Moreover, no objection can be taken to an account, in which a deceased agent charges himself with the receipt of money, on the ground that it does not appear by the account itself for whom the sums were received; provided it can be shown aliunde that they were in fact collected for a third person.<sup>7</sup> § 614

<sup>1</sup> *Doe v. Bevis*, 18 L. J., C. P. 128; 7 Com. B. 456, S. C.; *Whaley v. Carlisle*, 17 Ir. Law R., N. S. 792.

<sup>2</sup> 4 Y. & C., Ex. R. 283, 294, 295.

<sup>3</sup> Gr. Ev. § 153, in part.

<sup>4</sup> See per Bayley, J., in *Higham v. Ridgway*, 10 East, 123.

<sup>5</sup> *Gleadow v. Atkin*, 1 C. & M. 410, 423, 424; *Short v. Lee*, 2 Jac. & W. 489.

<sup>6</sup> *Middleton v. Melton*, 10 B. & C. 317, 327, per Parke, J.; ante, § 641.

<sup>7</sup> *Rowe v. Brenton*, 3 M. & R. 268—270.

§ 682. To render accounts admissible as the declarations of a deceased person charging himself, it is not necessary that they should be in his handwriting, and should bear his signature; but they will be received in evidence, if they were written by him either wholly<sup>1</sup> or in part,<sup>2</sup> though they were not signed; or if they were signed by him, though they were written by a stranger.<sup>3</sup> Neither can any objection be raised to their admission, though they were neither written nor signed by the deceased, if either direct proof can be furnished that they were written by his authorised agent,<sup>4</sup> or if that fact can be indirectly established, as, for instance, by showing that the deceased subsequently adopted the accounts as his own, and delivered them in at an audit;<sup>5</sup> nor does it signify in such a case, whether the party who actually wrote the accounts be alive or dead at the time of the trial, though, in the former event, his non-production may be matter of observation to the jury.<sup>6</sup> But if no proof can be given that the account was either written, or signed, or authorised, or adopted, by the deceased person made chargeable thereby, it cannot be received; and, therefore, where a rental, in which a deceased steward was debited with the receipt of certain payments, was written by a party since dead, styling himself clerk to such steward, the court refused to receive it as a declaration against the interest of the steward, as no parol evidence had been given to show that he ever employed the writer to make the entries; and it was equally inadmissible as made against the interest of the clerk, because it did not purport to charge *him*.<sup>7</sup> After the lapse of thirty years, the handwriting of the account need not be proved, provided the book containing it be produced from the proper custody.<sup>8</sup>

<sup>1</sup> *Rowe v. Brenton*, 3 M. & R. 267—269.

<sup>2</sup> *Doe v. Colcombe, C. & Marsh.* 155, per Coleridge, J.

<sup>3</sup> *Doe v. Stacey*, 6 C. & P. 139, per Tindal, C. J.

<sup>4</sup> *Bradley v. James*, 13 Com. B. 822.

<sup>5</sup> *Doe v. Hawkins*, 2 Q. B. 812; 1 G. & D. 551, S. C.; *Doe v. Mobbs, C. & Marsh.* 1; *May. of Exeter v. Warren*, 5 Q. B. 773; *Att.-Gen. v. Stephens*, 1 Kay & J. 740, per Wood, V.-C.

<sup>6</sup> 2 Q. B. 217, per Patteson, J.

<sup>7</sup> *Baron de Rutzen v. Farr*, 4 A. & E. 53; 5 N. & M. 617, S. C.

<sup>8</sup> *Wynne v. Tyrwhitt*, 4 B. & A. 376; *May. of Exeter v. Warren*, 5 Q. B.

§ 683.<sup>1</sup> Where the evidence consists of entries made by persons § 618 acting for others in the capacity of agents, stewards, or receivers, *some proof of such agency* is generally required, previous to their admission; but here a distinction has been taken, to the effect that, where the office is *public* and must exist, the law will presume that a person who acts in it has been regularly appointed; but that where it is merely *private*, some preliminary and independent evidence must in general be adduced of the existence of the office, and of the appointment of the particular agent or incumbent.<sup>2</sup> It seems that the mere antiquity of the book containing the entry affords no sufficient ground for dispensing with this preliminary proof, and therefore entries have been rejected for want of it, though apparently made as much as fifty, seventy, and even one hundred and sixty years before the trial.<sup>3</sup> In *Davies v. Morgan*, where the entry bore date 1673, Mr. Baron Bayley, in rejecting it, observed, "The character of the evidence must be established before the entry is read; you cannot read it to show the position of the party making it; that must be proved aliunde."<sup>4</sup> So, in *Short v. Lee*, Sir Thomas Plumer said, with reference to a book seventy years old, which purported to have been kept by a tithe-collector named Beale, "If the writings of persons not invested with the proper characters were received, nothing could be more dangerous to property. Suppose that Beale was not the person authorised to collect the tithes, but nevertheless had for some purpose made these entries; then, if after his death the book purporting to be a collector's book was to be evidence to prove that he was collector, and his being collector was to prove the entries to be correct, the consequence would be, that the rights of the rector on the one hand, or those of the parishioners on the other, would be exposed to the greatest danger, and perhaps from the writings of a person having a contrary interest."<sup>5</sup> Still, if

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773; *Doe v. Michael*, 17 Q. B. 276; *Att.-Gen. v. Stephens*, 1 Kay & J. 724, 740.

<sup>1</sup> Gr. Ev. § 154, in part.

<sup>2</sup> *Short v. Lee*, 2 Jac. & W. 467, 468, 474, 475, per Plumer, M. R.

<sup>3</sup> *Manby v. Curtis*, 1 Price, 225; *Short v. Lee*, 2 Jac. & W. 466, 467; *Davies v. Morgan*, 1 C. & J. 590, 591.

<sup>4</sup> 1 C. & J. 591.

<sup>5</sup> 2 Jac. & W. 467, 468.

ancient books come from the proper repository, slight proof of the official character of the writer will usually be sufficient to warrant their admission; and if they contain strong *internal* evidence of their actually being what they purport to be, they may, it seems, on that ground alone be submitted to the jury.<sup>1</sup>

§ 684. Under the head of declarations against *proprietary interest*, may be classed the statements made by persons while in possession of land, explanatory of the character of their possession; and it is now well settled that such declarations, *if made in disparagement of the declarant's title*, are receivable, not only as original admissions against himself and all persons who claim title through him,<sup>2</sup> but also as evidence for or against strangers.<sup>3</sup> Whether in this latter event they are admissible in the lifetime of the declarant, or only in cases where his death can be proved, is a point which does not appear to have been distinctly decided. In most of the cases where the evidence has been received, the declarant was dead;<sup>4</sup> but on two occasions, at least, the evidence was admitted, though the declarant was living.<sup>5</sup> The only ground on which it can be contended that these declarations are receivable

<sup>1</sup> Doe v. Thynne, 10 East, 206, 210; Brune v. Thompson, C. & Marsh. 36—39, per Ld. Denman; May. of Exeter v. Warren, 5 Q. B. 773; Doe v. Michael, 17 Q. B. 276; Att.-Gen. v. Stephens, 1 Kay & J. 724, 740. See ante, § 612.

<sup>2</sup> Ld. Trimlestown v. Kemmis, 9 Cl. & Fin. 780, 784, 785; Doe v. Pettett, 5 B. & A. 223; Doe v. Austin, 9 Bing. 41. For the American authorities, see West Cambridge v. Lexington, 2 Pick. 536; Little v. Libby, 2 Greenl. 242; Rankin v. Tenbrook, 6 Watts, 388, 390; Jackson v. Bard, 4 Johns, 230, 234; Weidman v. Kohr, 4 Serg. & R. 174; Giblehouse v. Strong, 3 Rawle, 437; Davies v. Campbell, 1 Iredell, 402; Crane v. Marshall, 4 Shepl. 27.

<sup>3</sup> Carne v. Nicoll, 1 Bing. N. C. 430; 1 Scott, 466, S. C.; Doe v. Langfield, 16 M. & W. 497; Doe v. Jones, 1 Camp. 367; Davies v. Pierce, 2 T. R. 53; Doe v. Rickarby, 5 Esp. 4; Peaceable v. Watson, 4 Taunt. 16; Doe v. Coulthred, 7 A. & E. 235; Garland v. Cope, 11 Ir. Law R. 514; Mountney v. Collier, 1 E. & B. 630; Gery v. Redman, L. R., 1 Q. B. D. 161; 45 L. J., Q. B. 267, S. C.

<sup>4</sup> Carne v. Nicoll, 1 Bing. N. C. 430; 1 Scott, 466, S. C.; Doe v. Jones, 1 Camp. 367; Davies v. Pierce, 2 T. R. 53; Peaceable v. Watson, 4 Taunt. 16; Doe v. Coulthred, 7 A. & E. 235; Doe v. Pettett, 5 B. & A. 223.

<sup>5</sup> Walker v. Broadstock, 1 Esp. 458, per Thomson, B.; Doe v. Rickarby, 5 Esp. 4, per Ld. Alvanley. In Papendick v. Bridgwater, 5 E. & B. 166, Walker v. Broadstock was denied to be law.

during the declarant's lifetime appears to be that they are statements accompanying the acts of possession, and as such constituting part of the *res gestæ*; but this argument proves too much, as the effect of it would be to let in all declarations of the occupier, whether in disparagement or in *support* of his title; an extension of the rule which, however consistent it may be with principle, is certainly not warranted by judicial decisions.<sup>1</sup> The safest course therefore is to regard these declarations as merely receivable when the declarant is dead, in which case they become good primary evidence;<sup>2</sup> and further to consider that their admissibility depends on the simple ground that they are made against the interest of the declarant.<sup>3</sup>

§ 685. It should here be remembered that possession is *prima facie* evidence of seisin in fee simple;<sup>4</sup> and, consequently, any declaration by the possessor that he is tenant in tail, or for life, or for years, or by sufferance, as it makes strongly against his own interest, may safely be received in evidence, on account of its probable truth.<sup>5</sup> It matters not whether the declaration be made verbally,<sup>6</sup> or in writing,<sup>7</sup> or by deed,<sup>8</sup> or by will, even though it be unproved,<sup>9</sup> or in a statement of defence to an action,<sup>10</sup> for the same

<sup>1</sup> See *Doe v. Wainwright*, 8 A. & E. 700, 701.

<sup>2</sup> *Doe v. Langfield*, 16 M. & W. 513, 514, per Parke, B.

<sup>3</sup> See *Phillips v. Cole*, 10 A. & E. 111, where Ld. Denman, in pronouncing the judgment of the court, observes, "It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interests of those who make them." <sup>4</sup> Ante, § 123.

<sup>5</sup> *Chambers v. Bernasconi*, 1 C. & J. 457, per Ld. Lyndhurst; *Peaceable v. Watson*, 4 Taunt. 17, per Sir J. Mansfield, C. J.; *Crease v. Barrett*, 1 C. M. & R. 931; 5 Tyr. 473, S. C., per Parke, B.; *Doe v. Langfield*, 16 M. & W. 497.

<sup>6</sup> *Carne v. Nicoll*, 1 Bing. N. C. 430; 1 Scott, 466, S. C.; *Baron de Bode's case*, 8 Q. B. 243, 244; *R. v. Birmingham*, 31 L. J., M. C. 63; 1 B. & S. 763, S. C.; *R. v. Exeter*, 4 Law Rep., Q. B. 341; 38 L. J., M. C. 127; 10 B. & S. 433, S. C.

<sup>7</sup> *Doe v. Jones*, 1 Camp. 367; *R. v. Exeter*, 4 Law Rep., Q. B. 341; 38 L. J., M. C. 127; & 10 B. & S. 433, S. C.

<sup>8</sup> *Doe v. Coulthred*, 7 A. & E. 235; *Garland v. Cope*, 11 Ir. Law R. 514; *Sly v. Sly*, L. R., 2 P. D. 91; 46 L. J., P. D. & A. 63, S. C.

<sup>9</sup> *O'Sullivan v. Burke*, I. R., 9 C. L. 105.

<sup>10</sup> *Ld. Trimlestown v. Kemmis*, 9 Cl. & Fin. 779, 780.

principle applies in all these cases; but it must relate to matters, either within the declarant's own knowledge, or on which he has himself formed an opinion; and therefore a statement of defence, narrating what the declarant has heard *another person state* respecting his title, is not admissible to defeat his estate, at least if he does not add that he believes such statement to be true.<sup>1</sup>

§ 686. It is difficult to fix with precision how far these declarations are admissible as evidence of the facts contained in them. They have been received to show the name of the landlord under whom,<sup>2</sup> and the identity of the will under which,<sup>3</sup> the declarant held, the amount of rent that was paid,<sup>4</sup> the fact of the payment of rent,<sup>5</sup> the extent of the tenement that was occupied,<sup>6</sup> and the fact that it was freehold and not copyhold;<sup>7</sup> and the courts seem now inclined to admit them, not only as proof of the interest which the declarant enjoyed in the premises, but as evidence of any fact which is not foreign to the statement against interests, and which forms substantially a part of it.<sup>8</sup> It appears that, in all these cases, it must be proved that the declarant was actually in possession of the land in question; since otherwise his declaration that he has a limited interest therein, may be regarded in the light rather of a statement in his own favour than of one against his interest.<sup>9</sup> Still, slight evidence on this head will, it seems, suffice;<sup>10</sup> and, therefore, where a person was seen felling timber in a wood, this act of his,—though probably he was in fact a mere labourer,—was held to be a sufficient assertion of ownership to raise a presumption that he was

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<sup>1</sup> *Id.* *Trimlestown v. Kemmis*, 9 Cl. & Fin. 780, 784—786, by the Lds., confirming the unanimous opinion of the judges.

<sup>2</sup> *Peaceable v. Watson*, 4 Taunt. 16; *Holloway v. Rakes*, cited by Buller, J., in *Davies v. Pierce*, 2 T. R. 55; *Doe v. Green*, 1 Gow, R. 227.

<sup>3</sup> *Sly v. Sly*, L. R., 2 P. D. 91; 46 L. J., P. D. & A. 63, S. C.

<sup>4</sup> *R. v. Birmingham*, 31 L. J., M. C. 63; 5 B. & S. 763, S. C.

<sup>5</sup> *R. v. Exeter*, 4 Law Rep., Q. B. 341; 38 L. J., M. C. 127; 10 B. & S. 433, S. C.

<sup>6</sup> *Mountney v. Collier*, 1 E. & B. 630.

<sup>7</sup> *Doe v. Jones*, 1 Camp. 367.

<sup>8</sup> *R. v. Birmingham*, 31 L. J., M. C. 63; 1 B. & S. 763, S. C.

<sup>9</sup> See *Crease v. Barrett*, 1 C. M. & R. 919, 931; 5 Tyr. 458, 473, S. C.

<sup>10</sup> *La Touche v. Hutton*, I. R., 9 Eq. 166.



possessed of the fee, and, consequently, to let in any statement made by him as to who was the actual proprietor.<sup>1</sup>

§ 687. In applying this rule, care must be taken to distinguish § 620 between statements made by an occupier of land in disparagement of his own title, and such declarations as merely go to abridge or encumber the estate itself; since, though the former are receivable, the latter will be rejected. For instance, if an occupier state that he is only tenant for life, this after his death will be admissible evidence against a stranger: but if he admit that the property was intersected by a public highway, or that a neighbour had an easement in the land in question, or that he himself was not entitled to common of pasture in respect of it, such admission will only bind himself and those who claim under him, and will be inadmissible to establish the highway or the easement as against his landlord or a stranger.<sup>2</sup> The grounds for this distinction are obvious: for though it is scarcely possible to imagine any inducement, which will lead a person possessed of premises in fee to admit that he is only a tenant, many causes might induce a tenant to acknowledge the existence of an easement or a highway, which might be either not inconvenient, or even absolutely beneficial to him.<sup>3</sup> So, a tenant, who was about to remove from one farm to another, might readily feel an interest in denying the existence of rights attached to the former, with the view of increasing the value of those which belonged to the latter.<sup>4</sup>

§ 688. Entries contained in the *books of deceased rectors or* § 621 *vicars* have long been admitted as evidence *in favour of their successors*.<sup>5</sup> The admissibility of this class of entries is regarded by

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<sup>1</sup> *Doe v. Arkwright*, 5 C. & P. 575, per Parke, J.

<sup>2</sup> *R. v. Bliss*, 7 A. & E. 550; *Scholes v. Chadwick*, 2 M. & Rob. 507, per Cresswell, J.; *Tickle v. Brown*, 4 A. & E. 378, per Patteson, J.; *Papendick v. Bridgwater*, 5 E. & B. 166.

<sup>3</sup> See *R. v. Bliss*, 7 A. & E. 551, per Ld. Denman; *Daniel v. North*, 11 East, 375, per Le Blanc, J.

<sup>4</sup> *Papendick v. Bridgwater*, 24 L. J., Q. B. 292, per Erle, J.; 5 E. & B. 166, 182, S. C.

<sup>5</sup> See *Daly v. Wilson*, Milw. Ec. Ir. R. 658—660; *Young v. Clare Hall*, 17 Q. B. 529.

some persons as anomalous;<sup>1</sup> by some, as governed by the rule which admits the old leases, rent-rolls, surveys, &c.;<sup>2</sup> and by others, as falling within the principle of the present exception.<sup>3</sup> Sir Thomas Plumer, in the case of *Short v. Lee*,<sup>4</sup> observed, that it was too late to argue upon the rule, or upon what gave rise to it; whether it was the *cursus Scaccarii*, the protection of the clergy, or the peculiar nature of property in tithes. "It is now," said he, "the settled law of the land. *It is not to be presumed, that a person, having a temporary interest only, will insert a falsehood in his book, from which he can derive no advantage.* Lord Kenyon has said, that the rule is an exception; and it is so; for no other proprietor can make evidence for those who claim under him, or for those who claim in the same right and stand in the same predicament. But it has been the settled law as to tithes, as far back as our research can reach. We must therefore set out from this as a datum; and we must not make comparisons between this and other corporations. No corporation sole, except a rector or vicar, can make evidence for his successor." The rule, however, extends to admit the books of ecclesiastical corporations aggregate,<sup>5</sup> and, as it would seem, those also of lay impropriators in fee; though these last would certainly be open to considerable suspicion, since a lay impropriator in fee, having a permanent interest to advance, might possibly be induced to make evidence for his heirs.<sup>6</sup>

§ 689. With respect to all these books, though the law admits them as evidence, juries will do well not to place implicit reliance on the statements they contain; for, in point of fact, the clergy,—like members of all other professions,—are, or at least *have been*, occasionally actuated by a strong esprit de corps, and the entries in their books evince not unfrequently what in some quarters would be considered as a commendable leaning in favour of the rights of the church. General observations have sometimes been

<sup>1</sup> *Outram v. Morewood*, 5. T. R. 123, per Ld. Kenyon.

<sup>2</sup> *Stobart v. Dryden*, 1 M. & W. 617, per Parke, B.

<sup>3</sup> 1 Ph. Ev. 308, 309.

<sup>4</sup> 2 Jac. & W. 477, 478.

<sup>5</sup> *Id.* 476—479.

<sup>6</sup> *Id.* 479—480, and cases there cited.

made respecting these books, which may seem to authorize the admission of any kind of statement contained in them. But such books will be rejected unless the entries contain receipts of money or ecclesiastical dues, or are, in other respects, apparently prejudicial to the pecuniary or proprietary interests of the makers.<sup>1</sup> And proof will be required, as in other cases, that the writer was authorized to receive the money stated, and that he is actually dead; and further, that the document came from the proper custody.<sup>2</sup>

§ 690. It remains only to notice a class of cases, which seems § 623 to fall within the principle now under consideration more naturally than any other, though one eminent writer on the law of evidence has treated it in connexion with entries made in the course of business:<sup>3</sup> we allude to those cases where the *indorsement* by the payee of the *payment of interest*, or of *part payment* of the principal, on a bond, bill of exchange, or other negotiable security, used to be tendered in evidence by *his representatives* after his death, in order to bar the Statute of Limitations, or to rebut the presumption of payment that would otherwise have arisen from lapse of time. Now, it is obvious, that, although such indorsements, if made before the demand became stale or was affected by the Statute of Limitations, would be against the interest of the payee, inasmuch as they would prevent him from recovering the amount of the sums so indorsed; yet, if they were made at a subsequent period, the creditor would be under the influence of a far stronger countervailing interest; because, by admitting a partial payment, he would keep alive his right to recover the remainder of the debt. Hence, it became necessary to show at what time the indorsement was really made; for if it were made before the creditor's remedy was impaired by lapse of time, it was received;<sup>4</sup> if after that period, it was rejected.<sup>5</sup> Still,

<sup>1</sup> 1 Ph. Ev. 303; Ward v. Pomfret, 5 Sim. 475.

<sup>2</sup> Greal. Ev. 224; Carrington v. Jones, 2 Sim. & St. 135, 145; Perigal v. Nicholson, Wightw. 63.

<sup>3</sup> 1 Ph. Ev. 330—335.

<sup>4</sup> Searle v. Ld. Barrington, 2 Str. 826; 8 Mod. 278; 2 Ld. Ray. 1370; 3 Br. P. C. 593, 8. C.; Bosworth v. Cotchett, 1 Ph. Ev. 333.

<sup>5</sup> Turner v. Crisp, 2 Str. 827; Glynn v. Bk. of England, 2 Ves. Sen. 38, 43; Briggs v. Wilson, 5 De Gez, M. & G. 12, 19, 20.

the question remained, how was the time to be proved? Might it be inferred from the instrument itself, or was it necessary to establish the fact by extrinsic evidence? And on this difficult point much contrariety of opinion prevailed.<sup>1</sup>

§ 691. Having thus stated briefly the old law relative to this subject, it remains to be shown how it has been effected by statutable enactments. So far as *notes*, *bills*, and other writings subject to the operation of the Statute of Limitations,<sup>2</sup> are concerned, the matter has been set at rest by Lord Tenterden's Act,<sup>3</sup> which enacts in § 3, that "no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the said statute."<sup>4</sup> An attempt was made a few years back to extend this salutary provision beyond its legitimate limits. An action was brought by the executor of the payee of a note against the maker, and the plaintiff, in order to defeat the Statute of Limitations, tendered in evidence a book, in which he himself, by the direction of the testator, had entered two payments of interest, as having been made to the testator by the defendant within the last six years. These entries were objected to, on one ground, among others, that their receipt in evidence would violate the spirit, if not the words, of the enactment just cited; but Sir John Jervis overruled the objection, and the Court of Common Pleas upheld his ruling.<sup>5</sup> § 624

§ 692. With respect to *bonds* and other *specialties*, the old doctrine of presumption of payment from lapse of time has been rendered nugatory by § 3 of 3 & 4 W. 4, c. 42, which enacts, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, § 625

<sup>1</sup> See cases referred to, post, §§ 693—696.

<sup>2</sup> 21 J. 1, c. 16.

<sup>3</sup> 9 G. 4, c. 14.

<sup>4</sup> As to the Irish Law, see 16 & 17 V., c. 113, §§ 20—24.

<sup>5</sup> *Bradley v. James*, 13 Com. B. 822.

and all actions of debt or *scire facias* upon any recognisance, &c., shall be commenced and sued within twenty years after the cause of such actions or suits; while § 5<sup>1</sup> contains a proviso, that, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon,<sup>2</sup> the person entitled to such action may bring it for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid; and the plaintiff may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid in answer to a plea of the statute.<sup>3</sup> As this Act contains no clause corresponding with § 3 of Lord Tenterden's Act, it seems clear that,—provided the point be properly raised by the pleading,—the acknowledgment of the debt afforded by the payment of interest or part payment of principal may, in the case of bonds and other specialties, be still proved in the same manner as formerly; that is, by producing the document and showing that it bears indorsements of such payments, even though these indorsements were written or adopted by the creditor himself, through whom the plaintiff claims. The only difference between the old and new law is, that, whereas this evidence was formerly admissible in answer to a plea of payment, it is now received in support of a replication setting up an acknowledgment by the defendant, where the original demand has been met by a plea of the statute.

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<sup>1</sup> See post, §§ 1090, 1091.

<sup>2</sup> In *Roddam v. Morley*, 26 L. J., Ch. 438; 1 De Gex & J. 1, S. C., it was held that payment of interest on a bond by the tenant for life for certain land under the will of the obligor, prevented this statute from barring the action against the heirs and devisees in remainder, after the expiration of twenty years from the time of the bond becoming due. See *Pears v. Laing*, 40 L. J., Ch. 225, per Bacon, V.-C.; 12 Law Rep., Eq. 41, S. C. But see *Coope v. Cresswell*, 2 Law Rep., Ch. App. 112; 36 L. J., Ch. 114, S. C., overruling S. C. as decided by *Kindersley*, V.-C.; 35 L. J., Ch. 496; 1 Law Rep., Eq. 106, S. C.; and *Dickenson v. Teasdale*, 1 De Gex, J. & S. 52; 32 L. J., Ch. 37, S. C.

<sup>3</sup> As to the Irish Law, see 16 & 17 V., c. 113, §§ 20—24.

§ 693. It becomes then important to solve the question whether it be, or be not, necessary to prove by evidence dehors the instrument itself, that the indorsement, which is put in for the purpose of establishing payment of interest, or part payment of principal, was written at a time when it was against the interest of the creditor to make it; or, in other words, that it was written before his right of action was barred by the statute; and here, notwithstanding some apparent authorities to the contrary, it is submitted that this question must be answered in the affirmative. The principle of admitting such indorsements in favour of parties *in privity* with the persons making them, is an anomaly in the law, which cannot be supported by any of the reasons whereon the admissibility of rectors' books is made to rest,<sup>1</sup> and which, so far as regards parol instruments, has been expressly reprobated by the Legislature.<sup>2</sup> It is therefore not unreasonable to contend, that the courts should require strict proof of the time when the indorsements were really made, before they consent to admit them in evidence. In ordinary cases, the law may safely presume that a document was written at the time it bears date; but an exception to this rule has been recognised,<sup>3</sup> where, under the old law of bankruptcy, a note signed by a bankrupt was put in by his assignees to support the petitioning creditor's debt. Now, why was this exception allowed? Clearly, because it was so much to the interest of the petitioning creditor to support the fiat, that he might collusively induce the bankrupt to antedate the instrument, by means of which his debt was to be established. Then, does not this reasoning apply equally to the indorsements under discussion,<sup>4</sup> which, if really made *within* twenty years from the date of the bond, are received, because being in such case entries against the interest of the obligee, they are presumed to be true; but, if made *beyond* the twenty years, are rejected, because, after the lapse of that time, it would be so obviously to the advantage of the obligee to revive, by their means, the remedy barred by the statute, that the law presumes they are false? But surely it is as easy to fabricate a date, as to fabricate an indorse-

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<sup>1</sup> Ante, § 688.

<sup>2</sup> 9 G. 4, c. 14, § 3.

<sup>3</sup> Ante, § 169. See, also, another exception noticed, ante, §§ 169, 582.

<sup>4</sup> See *Potez v. Glossop*, 2 Ex. R. 194, 195, per Parke, B.

ment, of which the date forms part, and it seems a strange mode of checking such fraudulent practices to say to an obligee, "Your remedy on the bond is barred by the statute, and therefore if you now indorse upon it any admission that you have received some interest from the obligor, no credit, after your death, will be given to such admission; but carry on your deceit one step further, and add to your indorsement a date, which will give it the semblance of having been made while your remedy was unimpaired, and then, at your death, your representatives may recover against the obligor."

§ 694. The authorities on this subject lay down no decisive rule. § 627 In the case of *Searle v. Lord Barrington*, extrinsic evidence was given of the time when the indorsements were made,<sup>1</sup> though that fact is only mentioned loosely by Mr. Brown,<sup>2</sup> and is not noticed at all by the other reporters.<sup>3</sup> In *Bosworth v. Cotchett*<sup>4</sup> it seems, indeed, to have been unsuccessfully contended before the House of Lords, that unless evidence were given, independent of the note, to show when the indorsements were made, they could not be received;<sup>5</sup> but as that case is not reported, and is noticed so shortly by our text writers<sup>6</sup> that the grounds of the decision cannot be ascertained, it will scarcely be considered as a binding authority. In *Sanders v. Meredith*, in addition to an indorsement signed by the obligee, a witness was called, who proved actual payment of the interest.<sup>7</sup> The case of *Gleadow v. Atkin*<sup>8</sup> throws but little light upon the subject. There the payment of interest by the obligor to a stranger was proved; and in order to show that this payment had been made on account of the bond, the executors of the obligee relied on an indorsement in his handwriting, whereby he acknow-

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<sup>1</sup> Per Bayley, B., in *Gleadow v. Atkin*, 1 C. & M. 421, 424, stating the result of his own researches.

<sup>2</sup> 3 Br., P. C., 594, where the reporter says that "other circumstantial evidence" was given to prove that the bond had not been satisfied.

<sup>3</sup> 2 Str. 826; 8 Mod. 278; 2 Ld. Ray. 1370.

<sup>4</sup> Judgment in Dom. Proc. 6 May, 1824.

<sup>5</sup> Per Vaughan, B., in *Gleadow v. Atkin*, 1 C. & M. 428. His lordship was of counsel in *Bosworth v. Cotchett*.

<sup>6</sup> 1 Ph. Ev. 333; 3 St. Ev. 824. In this last work the case is cited as *Parr v. Cotchett*.

<sup>7</sup> 3 M. & R. 116.

<sup>8</sup> 1 C. & M. 410.

ledged that the principal sum due on the bond was trust-money, to which the stranger was entitled. This indorsement bore the same date as the bond itself, and was countersigned by the attesting witness of the bond. The court held that it was admissible in evidence, and rightly so; because, in the first place, many circumstances concurred to show that the indorsement was written on or about the day of the date, and next, it signified little when it was written, as it was equally against the interest of the obligee at all times.<sup>1</sup>

§ 695. The only case which directly supports the presumption in question is that of *Smith v. Battens*.<sup>2</sup> There the point was, whether an indorsement of interest on a promissory note, which bore date before the first of January, 1829, when Lord Tenterden's Act came into operation, could be admitted in evidence for the purpose of taking the case out of the statute, without some extrinsic proof of the time when it was actually written; and Mr. Justice Taunton,—apparently on the authority of *Bosworth v. Crotchett*,<sup>3</sup>—received it, observing, that, “in the absence of all evidence to the contrary, he should assume that it was written at the time it bore date.” Now, although this case was subsequently cited with approbation by the Court of Common Pleas,<sup>4</sup> and by Lord Justice Turner, on a more recent occasion,<sup>5</sup> as supporting the general doctrine that documents are presumed to have been written at the time they bear date, it may be doubted whether, with respect to the particular question before the court, the case be law. To throw on the defendant the burthen of proving negatively that the indorsement was not written on the day of the date, was in fact to shut the door upon all inquiry into the matter; because, as the note continued in the hands of the payee or his representatives, it was scarcely possible for the maker to ascertain at what time any indorsement was written upon it.

§ 696. This view of the subject is much confirmed by the language § 69

<sup>1</sup> See per Bayley, B., 1 C. & M. 417.

<sup>2</sup> 1 M. & Rob. 341.

<sup>3</sup> Cited in the Report as *Parr v. Crotchett*.

<sup>4</sup> In *Anderson v. Weston*, 6 Bing. N. C. 302, 303.

<sup>5</sup> *Briggs v. Wilson*, 5 De Gex, M. & G. 20.



of Lord Ellenborough in *Rose v. Bryant*,<sup>1</sup> where the administrator of an obligee of a bond, for the purpose of meeting certain direct evidence of payment in the year 1794, proposed to read an indorsement, which appeared to have been made on the bond in the following year, and which acknowledged the receipt of interest and of part of the principal. In refusing to admit this evidence, his lordship said, "I think you must prove that these indorsements were on the bond at or recently after the times when they bear date, before you are entitled to read them. Although it may seem at first sight against the interest of the obligee to admit part-payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such indorsements were receivable whensoever they might have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest." Perhaps the safest rule that can be laid down on this subject is, that if the indorsement *appear by its date* to have been written within the twenty years, the question may be left to the jury, under all the circumstances of the case, whether it were *really* so written;<sup>2</sup> the law raising no presumption either way.

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<sup>1</sup> 2 Camp. 321

<sup>2</sup> See per Vaughan, B., in *Gleadow v. Atkin*, 1 C. & M. 426.

## CHAPTER XII.

## DECLARATIONS IN THE COURSE OF OFFICE OR BUSINESS.

§ 697. IN many of the cases cited in the preceding chapter, the admissibility of the statements and entries tendered in evidence rested on the ground, not only of their being prejudicial to the pecuniary or proprietary interests of the parties making them, but of their having been made *in the ordinary course of business or professional employment*. The class of cases, therefore, which forms the FIFTH EXCEPTION to the rule rejecting hearsay evidence, consists of such declarations as fall within this last category. The considerations which have induced the courts to recognise this exception appear to be principally these;—that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth.<sup>1</sup>

§ 698.<sup>2</sup> One of the earliest cases,<sup>3</sup> illustrative of this subject, was an action for beer sold and delivered, the plaintiff being a

<sup>1</sup> Poole v. Dica, 1 Bing. N. C. 653, per Tindal, C. J.; 1 Ph. Ev. 319; 1 St. Ev. 348, 349.

<sup>2</sup> Gr. Ev. § 116, in part.

<sup>3</sup> Price v. Torrington, 1 Salk. 285; 2 Ld. Ray. 873; 1 Smith. L. C. 277, S. C.; Pitman v. Maddox, 2 Salk. 690; 2 Ld. Ray. 732, S. C.; Rowcroft v. Basset, Pea. Add. Cas. 199, 200, per Le Blanc, J.

brewer. In order to prove the delivery, it was first shown that, in the usual course of the plaintiff's business, the draymen came every night to the clerk of the brewhouse, and gave him an account of the beer delivered during the day, which he entered in a book kept for that purpose, to which the draymen set their hands. An entry in this book, which stated the delivery of the beer in question, and was signed by a drayman, whose signature and death were proved, was then put in, and Lord Holt held that it was sufficient evidence to maintain the action. So, where the question was whether a notice to quit had been served upon a tenant, the indorsement of service upon a copy of the notice, made by the attorney who served it, was held after his death to be admissible in proof of that fact; it being shown to be the ordinary course of business in his office to preserve copies of such notices, and to indorse the service thereon.<sup>1</sup>

§ 699. So, an entry by a deceased solicitor in his diary, noting the fact of his having attended a client on a certain day on her executing a deed of appointment, has been held sufficient evidence of the due execution of the deed.<sup>2</sup> So, an entry of the receipt of rates by a deceased clerk of a collector, who was duly appointed, has been received as evidence of the payment of the rates.<sup>3</sup> So, also, the books of the messenger of a bank, and of the clerk of a notary, have been held admissible to prove the dishonour of a bill of exchange by the acceptor, and notice to the indorser, upon proof that the entries were made in the usual routine of business;<sup>4</sup> and upon like proof, the letter-book of the plaintiff, who was a merchant,

<sup>1</sup> *Doe v. Turford*, 3 B. & Ad. 890; *R. v. Cope*, 7 C. & P. 726, 727, per *Ld. Denman*; *R. v. Dukinfield*, 11 Q. B. 678; *Stapylton v. Clough*, 2 E. & B. 933.

<sup>2</sup> *Rawlins v. Rickards*, 28 Beav. 370. See *Bright v. Legerton*, 30 L. J., Ch. 338; 2 De Gex, F. & J. 606, S. C.; per *Ld. Campbell, C.*, overruling in part a decision by *Romilly, M. R.*, in S. C., reported 29 L. J., Ch. 852; 29 Beav. 60, S. C. But see *Kerin v. Davoren*, 12 Ir. Eq. R., N. S. 352.

<sup>3</sup> *R. v. St. Mary, Warwick*, 22 L. J., M. C. 109.

<sup>4</sup> *Sutton v. Gregory*, Pea. Add. Cas. 150, per *Ld. Kenyon*; *Poole v. Dicas*, 1 Bing. N. C. 649; 1 Scott, 600; 7 C. & P. 79, S. C.; *Nichols v. Webb*, 8 Wheat. 326; *Welch v. Barrett*, 15 Mass. 380; *Halliday v. Martinett*, 20 Johns. 168; *Butler v. Wright*, 2 Wend. 369; *Hart v. Williams*, id. 513; *Nicholls v. Goldsmith*, 7 Wend. 160.

in which a deceased clerk had inserted what purported to be the copy of a letter to the defendant, and had further made a memorandum stating that he had sent the original letter, has been admitted as evidence of the fact of sending the letter, as also of its contents, the defendant having been served with notice to produce the original.<sup>1</sup> So, where a police-constable had made, in the course of his *duty*, a verbal report to his inspector, stating where he was going and what he was about to do, this report was held to be admissible as evidence for the Crown on the trial of an indictment, which charged the prisoner with the murder of the policeman.<sup>2</sup>

§ 700. Though the cases cited above have established beyond dispute the existence of the exception now under discussion, several of the judges have, of late years, evinced *great disinclination to extend its principle* beyond the limits strictly warranted by antecedent decisions.<sup>3</sup> Thus, in an action for the price of coals, which had been sold at the pit's mouth, an entry was rejected, which appeared to have been made in the following manner. In the ordinary course of business, it was the duty of one of the workmen at the pit, named Harvey, to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ a man named Baldwin to make entries in the books from his dictation. Baldwin read over these entries every evening to the foreman. At the time of the trial, Harvey and the foreman were dead, and Baldwin was called to produce this book, with the view of proving thereby the delivery of the coal in question; but the court held that it was inadmissible.<sup>4</sup> The ground of this decision appears to have been, that, although the entries, being made under the foreman's direction, might be regarded as made by

<sup>1</sup> Pritt v. Fairclough, 3 Camp. 305; Hagedorn v. Reid, id. 379. See, also, Champneys v. Peck, 1 Stark. R. 404; Doe v. Langfield, 16 M. & W. 497, 515; East Union Rail. Co. v. Symonds, 5 Ex. R. 237; 6 Rail. Cas. 578, S. C. But see Rowlands v. De Vecchi, 1 Cab. & El. 10, per Day, J.

<sup>2</sup> R. v. Buckley, 13 Cox, 293, per Lush & Mellor, Js.

<sup>3</sup> See Doe v. Skinner, 3 Ex. R. 84; Smith v. Blakey, 36 L. J., Q. B. 156; 2 Law Rep., Q. B. 326; 8 B. & S. 157, S. C.; The Henry Coxon, 47 L. J., Adm. 83; L. R., 3 P. D. 156, S. C.; Massey v. Allen, 49 L. J., Ch. 76, per Hall, V.-C.; L. R., 13 Ch. D. 558, S. C.

<sup>4</sup> Brain v. Preece, 11 M. & W. 773.

him, yet, inasmuch as he had no *personal knowledge* of the facts stated in them, but derived his information at second-hand from the workman, there was not the same guarantee for the truth of the entries as might be found in *Price v. Torrington*, *Doe v. Turford*, and *Poole v. Dicus*; in all of which cases the party making the entry had himself done the business, a memorandum of which he had inserted in his book.

§ 701. It seems more difficult to reconcile the case of *Davis v. Lloyd*<sup>1</sup> with sound principle, or with previous decisions. There, in order to show that a Jew was of age, it was proved that Jewish children were circumcised on the eighth day from their birth, and that it was the duty of the chief rabbi to perform this rite, and to make an entry thereof in a book kept at the synagogue. Upon proof that the rabbi was dead, this book was tendered in evidence; but Lord Denman, after consulting Mr. Justice Patteson, rejected it, though it does not appear on what grounds. In another case,<sup>2</sup> where it was necessary to show that a contract of service had been for less than a year, proof was given that the employer, who was dead, had in the course of his business been in the habit of hiring farm servants, and that his practice was to enter the time and terms of such hiring in a book kept by him for that purpose. This book, which contained entries of the service in question, and showed that the servant had been engaged for half a year only, was tendered in evidence; but the court held that it was inadmissible, on the ground that, although it might be the practice, it was not the *duty*, of the master to make such entries.

§ 702. The Legislature has in one instance recognised and acted upon the exception under discussion; for the statute, which now regulates the Civil Bill Courts in Ireland,<sup>3</sup> enacts in § 19, that "a book or books shall be kept by every officer appointed for the service of process, in such form as shall be directed or approved by the chairman or assistant barrister; in which shall be entered the names of the plaintiff and defendant by or against whom any process shall be issued, the cause of action, the day on

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<sup>1</sup> 1 C. & Kir. 275.

<sup>2</sup> R. v. Worth, 4 Q. B. 132.

<sup>3</sup> 14 & 15 V., c. 57., Ir.

which such process shall be received to be served, the day on which such process shall be served or executed, the place where, and the name or description of the person on or with whom, such process shall be served or left, and in case any such process shall not have been duly served or left, then the cause of such service not having been effected shall be stated; and each and every process-officer shall attend, and produce such book or books to the chairman or assistant barrister, at each and every sessions of the peace, or shall cause such book or books to be produced to such chairman or barrister in case of the *unavoidable absence* of such process-officer; and in case of the *death, illness, or such absence* as aforesaid of any such process-officer, the book or books of such process-officer, kept by him as aforesaid, verified on oath as to his handwriting by some credible person, shall be produced at the sessions, and shall there be *prima facie* evidence of the truth of the several matters entered therein as aforesaid."

§ 703. In many respects the rules which regulate the reception of this species of evidence, are the same as those which prevail with respect to declarations against interest. For instance, the death,<sup>1</sup> the handwriting, and the official character,<sup>2</sup> of the person who made the entry must be proved; and it should further appear that he had no motive to misstate. In some particulars, however, a marked distinction exists between the two classes of cases.

§ 704. First, in order to render admissible entries made in the course of office or business, they must,—unlike declarations against interest,—be proved to have been made *contemporaneously with the acts which they relate.*<sup>3</sup> This distinction was expressly pointed out by Mr. Baron Parke in *Doe v. Turford*. "It is to be observed," said the learned judge, "that in the case of an entry against interest, proof of the handwriting of the party, and of his death, is enough to authorise its reception; at whatever time it was made it is admissible: but in the other case [of an entry made in the

<sup>1</sup> See *Cooper v. Marsden*, 1 Esp. 1, per Ld. Kenyon. See ante, § 669.

<sup>2</sup> *Doe v. Wittcomb*, 6 Ex. R. 601.

<sup>3</sup> *Doe v. Beviss*, 18 L. J., C. P. 128; 7 Com. B. 456, S. C.; *Doe v. Skinner*, 3 Ex. R. 88, per Parke, B.

course of business], it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry."<sup>1</sup> In using the word "contemporaneous," it is not meant that the entry must have been made at the immediate time of the occurrence; but it will be sufficient if made within so short a time after, as reasonably to be considered part of the transaction. Thus, if the business be done in the morning, and the entry be made in the evening of the same day,<sup>2</sup> or perhaps even on the following morning,<sup>3</sup> it will be sufficient; though, where several intermediate days had elapsed between the date of the transaction and the time of inserting an entry of it in the book, the evidence has been rejected;<sup>4</sup> and in one American case, the interval of a single day was held to constitute a valid objection.<sup>5</sup> The fact that the entry was made contemporaneously may, like any other fact, be established either by direct testimony, or by proof of any circumstances sufficient to raise a reasonable inference that such was the case.<sup>6</sup>

§ 705. Secondly, it has been shown in the last chapter, that declarations against interest are often admissible to prove *independent matters*, which, though forming part of the entry, are not in themselves against the interest of the declarant.<sup>7</sup> A stricter rule, however, prevails with respect to official or business entries, and it has been held that, "whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances."<sup>8</sup> In the case which called forth these obser-

<sup>1</sup> 3 B. & Ad. 897, 898, cited and approved by Park, J., in *Poole v. Dicus*, 1 Bing. N. C. 654, 655.

<sup>2</sup> *Price v. Torrington*, 1 Salk. 285; *Ray v. Jones*, 2 Gale, 220; *Curren v. Crawford*, 4 Serg. & R. 3, 5. <sup>3</sup> *Ingraham v. Bockins*, 9 Serg. & R. 285.

<sup>4</sup> *Forsythe v. Norcross*, 5 Watts, 432.

<sup>5</sup> *Walter v. Bollman*, 8 Watts, 544.

<sup>6</sup> *East Union Rail. Co. v. Symonds*, 5 Ex. R. 237; 6 Rail. Cas. 578, S. C.

<sup>7</sup> Ante, §§ 677—679.

<sup>8</sup> *Chambers v. Bernasconi*, 1 C. M. & R. 368, per *Ld. Denman*, pronouncing the unanimous opinion of the Ex. Ch. See, also, *Percival v. Nanson*, 7 Ex. R. 3, per *Pollock, C. B.*; and *Polini v. Gray* and *Sturla v. Freccia*, L. R., 12 Ch. D. 411, per *Ct. of App.*; 49 L. J., Ch. 41, S. C.; S. C. in *Dom. Pr.*, 50 L. J., Ch. D. 86.

vations, it became necessary to show in what *place* the plaintiff had been arrested; and in order to do this, a certificate of a deceased sheriff's officer, which had been returned by him to the office in the ordinary routine of his duty, and which specified, among other circumstances connected with the arrest, the spot where it took place, was tendered in evidence; but the judges of the Exchequer Chamber, before whom the question was argued on a bill of exceptions,—while they admitted, for the sake of argument, that the certificate was evidence of the arrest itself, as also of the day when it was made, since it might be necessary for the officer to make known these facts to his principal,—were all clearly of opinion that it could not be received to show the particular spot where the caption took place, that circumstance being merely collateral to the duty done.<sup>1</sup> “This decision,” as was afterwards observed by Mr. Justice Park, “turned on the circumstance that the sheriff's officer was going beyond the sphere of his duty when he made an entry of the *place* of arrest, and that such an entry therefore had no claim to be received as evidence of that fact.”<sup>2</sup>

§ 706. Some persons contend that the rule under discussion is § 638 subject to a third qualification, which certainly does not apply to declarations against interest, and which is to this effect;—namely, that entries made in the course of office or business cannot be admitted, unless *corroborated by other circumstances which render it probable that the facts therein recorded really occurred*. This opinion seems to rest, partly, on a supposed dictum of Mr. Justice Taunton;<sup>3</sup> partly, on a misapprehension of the rule adopted by Lord Wensleydale, that an entry made in the course of business

<sup>1</sup> Chambers v. Bernasconi, 1 C. M. & R. 347, 368; 4 Tyr. 531, S. C.

<sup>2</sup> Poole v. Dicus, 1 Bing. N. C. 655. See, also, per Tindal, C. J., id. 651.

<sup>3</sup> Doe v. Turford, 3 B. & Ad. 898, where his lordship is made to say, “A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that \*that fact occurred, is admissible in evidence. Those corroborating circumstances must be proved; and here many such circumstances did appear.” Mr. Phillips suggests that the words, “the entry was made when,” have probably been omitted by accident at the place marked with the star. 1 Ph. Ev. 324.



is admissible "where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place;"<sup>1</sup> and partly on the circumstance, that, in one or two of the later cases on the subject, confirmatory evidence has in fact been adduced, and its existence has been noticed by the court as tending to establish the correctness of the entry.<sup>2</sup> Still, Mr. Phillipps is probably right in rejecting this qualification, and in contending that, though corroborative evidence must naturally add to the *value* of entries, it cannot be deemed essential to their *admissibility*.<sup>3</sup>

§ 707. It has further been urged that entries in the course of § 639 business will only be received, when the nature of the case is such as to render better evidence unattainable; but this limitation of the rule has been expressly rejected in *Poole v. Dicas*, where Chief Justice Tindal, after observing that *Doe v. Turford* was no authority for the proposition, since in that case persons might have been present when the notice was served, continued thus:—"In the present case, it would operate as a great hardship to require the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application; and if it were necessary to call all the persons who resided at the place of presentment, the expense and inconvenience would be enormous. The rejection of the evidence which has been received would be a great injury to the commercial classes, by casting an unnecessary difficulty on the holders of bills of exchange."<sup>4</sup>

§ 708. From the cases cited above it may be collected, that, in § 640 order to bring a declaration within the present exception, proof must be given that it was made contemporaneously with the fact

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<sup>1</sup> *Doe v. Turford*, 3 B. & Ad. 897.

<sup>2</sup> *Id.* 890, 897; *Poole v. Dicas*, 1 Scott, 600; 1 Bing. N. C. 649, 653, 654, S. C.

<sup>3</sup> 1 Ph. Ev. 324. See *R. v. Cope*, 7 C. & P. 726, 727, per Ld. Denman.

<sup>4</sup> 1 Bing. N. C. 654. The same rule prevails with respect to declarations against interest, ante, § 681.

which it narrates, and in the usual routine of business, by a person whose duty it was to make the whole of it,<sup>1</sup> who was himself personally acquainted with the fact, who had no interest in stating an untruth, and who is since dead;<sup>2</sup> and, provided all the terms of this proposition be satisfied, it seems to be immaterial, excepting so far as regards the *weight* of the evidence, that more satisfactory proof might have been produced, that the declaration is uncorroborated by other circumstances, or that it consists of a mere oral statement, which has never been reduced to writing.<sup>3</sup>

§ 709.<sup>4</sup> In the United States this principle has been extended <sup>to</sup> <sup>§ 641</sup> *entries made by the party himself* in his own shop-books;<sup>5</sup> at least, where they were evidently contemporaneous with the facts to which they refer, and formed part of the *res gestæ*. Being the acts of the party himself, they are received with the greater caution; but still they may be seen and weighed by the jury. Though this doctrine is not in accordance with the principles of the common law, at least as now understood,<sup>6</sup> it seems to have been regarded as sound law by the Legislature, if not by the judges, in the time of James the First. In 1609 an Act was passed<sup>7</sup> "to avoid the double payment of debts," which clearly recognised a tradesman's shop-books as instruments of evidence on his behalf. No doubt this statute, in modern times, has been treated in courts of justice as a dead letter; but, strangely enough, after lying dormant for upwards of two centuries, it was in the year 1863 revived and rendered perpetual by the Act of 26 and 27

<sup>1</sup> *Stapylton v. Clough*, 2 E. & B. 933; *Trotter v. Maclean*, L. R., 13 Ch. D. 574, per Fry, J.

<sup>2</sup> See *Doe v. Wittcomb*, 6 Ex. R. 601; 4 H. of L. Cas. 425, S. C.

<sup>3</sup> *Ante*, § 672.

<sup>4</sup> Gr. Ev. § 118, in part.

<sup>5</sup> For the American statutes and decisions on the above subject, see notes to § 641 of the first three editions of this work; also notes to Gr. Ev. § 118.

<sup>6</sup> *Ellis v. Cowne*, 2 C. & Kir. 719, per Wilde, C. J.; *Smyth v. Anderson*, 7 Com. B. 21. In this last case the books of the plaintiff were tendered in evidence by him, to show that he had, throughout a sale effected by means of an agent, debited the defendant as principal. The court, however, rejected the evidence.

<sup>7</sup> 7 J. 1, c. 12.

V., c. 125. What will be the practical result when this Parliamentary freak is brought under the notice of the judges is a question that cannot readily be answered; but thus much seems clear, that the Act itself ought to be inserted in this place. It is a curious specimen of quaint legislation, and it will at least furnish useful hints when stale demands are sought to be enforced in the county courts.

§ 710. The Act is as follows:—"Whereas divers men of trades, and handicraftsmen, keeping shop-books, do demand debts of their customers upon their shop-books long time after the same hath been due, and when, as they have supposed, the particulars and certainty of the wares delivered to be forgotten, then either they themselves, or their servants, have inserted into their said shop-books divers other wares supposed to be delivered to the same parties, or to their use, which in truth never were delivered, and this of purpose to increase by such undue means the said debt: (2.) And whereas divers of the said tradesmen and handicraftsmen, having received all the just debts due upon their said shop-books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors or administrators, are often by suits of law enforced to pay the same debts again to the party that trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proof, by writing or witnesses, of the said payments, that may countervail the credit of the said shop-books, which few or none can do in any long time after the said payments: (3.) Be it therefore enacted by the authority of this present Parliament, that no tradesman or handicraftsman keeping a shop-book as is aforesaid, his or their executors or administrators, shall be allowed, admitted, or received, to give his shop-book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares, or work done, within

one year next after the same wares delivered, money due for wares delivered, or work done. II. Provided always, that this Act, or anything herein contained, shall not extend to any intercourse of traffick, merchandizing, buying, selling, or other trading or dealing for wares delivered or to be delivered, money due, or work done or to be done, between merchants and merchants, merchant and tradesman, or between tradesman and tradesman, for anything directly falling within the circuit or compass of their mutual trades and merchandize, but that for such things only they and every of them shall be in case as if this Act had never been made; anything herein contained to the contrary thereof notwithstanding."

§ 711. Independent of all statutable sanction our courts of equity have for years past, to a certain extent, acted upon the principle of admitting shop-books in evidence, where accounts have been required to be taken, and vouchers have been lost;<sup>1</sup> and now, by virtue of the Rules of the Supreme Court, 1883, the court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary accounts to be taken, and "may, either by the judgment or order directing the account to be taken, or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched; and in particular may direct that, in taking the account, the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."<sup>2</sup>

§ 712.<sup>3</sup> In the administration of the Roman Law, the production of a merchant's or tradesman's book of accounts, regularly and fairly kept in the usual manner, was deemed presumptive evidence

<sup>1</sup> *Lodge v. Prichard*, 3 De Gex, M. & G. 908. See post, § 812.

<sup>2</sup> Ord. XXXIII., RR. 2, 3. For the law in Ireland, see 30 & 31 V., c. 44, § 158, Ir. See *Lodge v. Prichard*, 3 De Gex, M. & G. 906; *Newberry v. Benson*, 23 L. J., Ch. 1003, coram I. ds. Js.; *Ewart v. Williams*, 3 Drew. 21; 7 De Gex, M. & G. 68, S. C. coram I. ds. Js.; *Cookes v. Cookes*, 3 New R. 97, per I. ds. Js.; *O'Grady v. Corr*, I. R., 10 Eq. 111; *Alford v. Clay*, I. R., 9 Eq. 215.

<sup>3</sup> Gr. Ev. § 119, verbatim.

(semi-plena probatio)<sup>1</sup> of the justice of his claim, and in such cases, the suppletory oath of the party (*juramentum suppletivum*) was admitted to make up the plena probatio necessary to a decree in his favour.<sup>2</sup> By the law of France, too, the books of merchants and tradesmen, regularly kept, and written from day to day without any blank, when the tradesman has the reputation of probity, constitute a semi-proof, and, with his suppletory oath, are received as full proof to establish his demand.<sup>3</sup> The same doctrine is familiar in the law of Scotland, by which the books of merchants and others, if kept with such a reasonable degree of regularity as to be satisfactory to the court, may be received in evidence, the party being allowed to give his own "oath in supplement" of such imperfect proof. It seems, however, that a course of dealing, or other "pregnant circumstances," must in general be first shown by evidence aliundè, before the proof can be regarded as amounting

<sup>1</sup> This degree of truth is thus defined by Mascardus:—"Non est ignorandum probationem semiplenam eam esse, per quam rei gestæ fides aliqua fit iudici. non tamen tanta ut jure debeat in pronuncianda sententia eam sequi." 1 de Prob., Quæst. 11, n. 1, 4.

<sup>2</sup> "Juramentum (suppletivum) defertur ubicunque actor habet pro se—aliquas conjecturas, per quas iudex inducatur ad suspicionem vel ad opinandum pro parte actoris." 3 Masc. de Prob., Concl., 230, n. 17. The civilians, however they may differ as to the degree of credit to be given to books of account, concur in opinion, that they are entitled to consideration, at the discretion of the judge. They furnish at least the *conjecturæ* mentioned by Mascardus; and their admission in evidence, with the suppletory oath of the party, is thus defended by Paul Voet, de Statutis, § 5, cap. 2, n. 9:—"An ut credatur libris rationem, seu registris uti loquuntur, mercatorum et artificum, licet probationibus testium non juventur? Respondeo, quamvis exemplo perniciosum esse videatur, quemque sibi privata testatione, sive adnotatoine facere debitorem. Quia tamen hæc est mercatorum cura et opera, ut debiti et crediti rationes diligenter conficiant. Etiam in eorum foro et causis, ex æquo et bono est judicandum. Insuper non admissio aliquo litium accelerandarum remedio, commerciorum ordo et usus evertitur. Neque enim omnes præsentī pecunia merces sibi comparant, neque cujusque rei venditioni testes adhiberi, qui pretia mercium noverint, aut expedit, aut congruum est. Non iniquum videtur illud statutum, quo domesticis talibus instrumentis additur fides, modo aliquibus adminiculis juventur." See, also, Hertius, de Coll. Leg. § 4, n. 68; 7 Stryk. de Sem. Prob., Disp. 1, cap. 4, § 5; Menoch., de Præs., lib. 2, Præs. 57, n. 20, and lib. 3, Præs. 63, n. 12.

<sup>3</sup> Poth. Obl., Part iv. ch. 1, art. 2, § 4. By the Code Napoleon, merchants' books are required to be kept in a particular manner therein prescribed, and none others are admitted in evidence. Code de Commerce, Liv. 1, tit. 2, art. 8—12.

to that degree of *semi-plena probatio*, which may be rendered complete by the oath of the party.<sup>1</sup>

§ 718. Especial reference is here made to these laws, because it is conceived that the adoption of a somewhat similar practice in all the English and Irish courts of justice would prove highly beneficial; especially in cases where actions are brought or defended by the representatives of persons deceased. § 643

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<sup>1</sup> Tait, Ev. 273—277. This degree of proof is there defined as “not merely a suspicion,—but such evidence as produces a reasonable belief, though not complete evidence.” See, also, 2 Dickson, Ev. § 1179, et. seq.; Glassf. Ev. 550; Bell, Dig. 378, 898.

## CHAPTER XIII.

## DYING DECLARATIONS

§ 714.<sup>1</sup> A SIXTH EXCEPTION to the rule rejecting hearsay evidence is allowed in the case of *dying declarations*. The general principle on which this species of evidence is admitted, was stated by Lord Chief Baron Eyre to be this,—“that such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice.”<sup>2</sup> At one time an opinion prevailed that this general principle warranted the admission of dying declarations in all cases, civil and criminal;<sup>3</sup> and it was expressly held, by respectable authorities, that the dying declarations of a subscribing witness to a forged instrument could be given in evidence to

<sup>1</sup> Gr. Ev. § 165, in part.

<sup>2</sup> R. v. Woodcock, 1 Lea. 502; R. v. Drummond, id. 338. Our great poet, in *King John*, has put the same sentiment into the mouth of the wounded Melun, who, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis, exclaims:—

“Have I not hideous death within my view,  
Retaining but a quantity of life;  
Which bleeds away, even as a form of wax  
Resolveth from his figure 'gainst the fire?  
What in the world should make me *now* deceive,  
Since I must lose the use of all deceit?  
Why should I then be false; since it is true  
That I must die here, and live hence by truth?—Act 5, sc. 4.

<sup>3</sup> It was even held that the dying declarations of a pauper respecting his settlement were admissible, though that question involved both law and fact, R. v. Bury St. Edmunds, Cald. 486; Abbotun v. Dunswell, 2 Bott, 80. This doctrine is now properly exploded. See R. v. Abergwilly, 2 East, 63; Stobart v. Dryden, 1 M. & W. 626.

impeach it.<sup>1</sup> A contrary doctrine, however, has since prevailed;<sup>2</sup> and it is now settled law, both in England and America, that proof of this description is admissible in no civil case—and, in criminal cases, only in the single instance of *homicide*, “where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration.”<sup>3</sup>

§ 715. Thus, on a trial for robbery, the dying declaration of the party robbed has been rejected;<sup>4</sup> and where a prisoner was indicted for administering drugs to a woman, with intent to procure abortion, her statements in extremis were held to be inadmissible.<sup>5</sup> So, where a party, convicted of perjury, had obtained a rule nisi for a new trial, and, pending the proceedings, had shot the prosecutor, the Court of King’s Bench, on cause being shown against the rule, rejected the affidavit of the dying declarations of the latter, as to the transaction out of which the prosecution for perjury arose.<sup>6</sup> After stating these strong cases, it seems scarcely necessary to add, that in an action of ejectment the court refused to receive the dying declarations of a servant of the party last seised, as to the relationship of such party with the lessor of the plaintiff;<sup>7</sup> and that in Ireland, on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who on his death-bed confessed that he had

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<sup>1</sup> *Wright v. Littler*, 3 Burr. 1255; 1 W. Bl. 349, S. C., per Ld. Mansfield; stating, however, as reported in Blackstone, that no general rule could be drawn from the admission of the evidence in that particular case; *Anon.*, per Heath, J., cited with apparent approbation by Ld. Ellenborough in *Aveson v. Ld. Kinnaird*, 6 East, 195, 196, and in *Bp. of Durham v. Beaumont*, 1 Camp. 210, and explained by Bayley, J., in *Doe v. Ridgway*, 4 B. & A. 55.

<sup>2</sup> See *Stobart v. Dryden*, 1 M. & W. 624—627, where the cases cited in the preceding note were virtually overruled. See ante, § 568.

<sup>3</sup> *R. v. Mead*, 2 B. & C. 608; 4 D. & R. 120, S. C.; *R. v. Hind*, 29 L. J., M. C. 147; 8 Cox, 300, S. C.; *Bell, C. C. 253*, S. C.; 1 East, P. C. 353; *Wilson v. Boerem*, 15 Johns. 286.

<sup>4</sup> *R. v. Lloyd*, 4 C. & P. 233.

<sup>5</sup> *R. v. Hutchinson*, 2 B. & C. 608, n., per Bayley, J.; *R. v. Hind*, 29 L. J., M. C. 147; 8 Cox, 300, S. C.; *Bell, C. C. 253*, S. C. In 1 Ph. Ev. 282, these declarations are stated to have been held admissible, but this is a mistake.

<sup>6</sup> *R. v. Mead*, 2 B. & C. 605; 4 D. & R. 120, S. C.

<sup>7</sup> *Doe v. Ridgway*, 4 B. & A. 53.



committed the crime.<sup>1</sup> Upon one occasion the judges appear to have intrenched somewhat upon this rule; for a prisoner being indicted for poisoning his master, and it appearing that a maid-servant had taken some of the same poison, and died in consequence, her dying declarations were admitted on the part of the prosecution, apparently on the ground that it was all one transaction.<sup>2</sup>

§ 716.<sup>3</sup> The reasons for thus restricting the admission of this species of evidence may be,—first, the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain,—secondly, the danger of letting in incomplete statements, which, though true as far as they go, do not constitute “the whole truth,”—and thirdly, the experienced fact, that implicit reliance cannot in all cases be placed on the declarations of a dying person; for his body may have survived the powers of his mind;<sup>4</sup> or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say, or seem to say, whatever they choose to suggest.<sup>5</sup> As these, or the like considerations, are thought in ordinary cases to counterbalance the force of the general principle above stated, the exception under review is restricted to cases of homicide, and is there recognised on the sole ground of public necessity. For as it often happens that no third person was present as an eye-witness to a murder, and as the party injured, who is the usual witness in other cases of felony, cannot himself be called, it follows that if his dying declarations could not be received, the murderer might often

<sup>1</sup> R. v. Gray, Ir. Cir. R. 73, per Torrens, J.

<sup>2</sup> R. v. Baker, 2 M. & Rob. 53, per Coltman, J., after consulting Parke, B. The point would have been reserved for the opinion of the judges, but the prisoner was acquitted.

<sup>3</sup> Gr. Ev. § 156, in part.

<sup>4</sup> Thus, in *King John*, Prince Henry is made to say:—

“Death’s siege is now

Against the mind, the which he pricks and wounds

With many legions of strange fantasies;

Which, in their throng and press to that last hold,

Confound themselves.”—Act 5, sc. 7.

<sup>5</sup> Jackson v. Kniffen, 2 Johns. 31, 35, per Livingston, J.

escape justice.<sup>1</sup> Still, this restriction applies only to such declarations as are tendered in evidence merely because they were made in extremis; for where they constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, they are admissible as in other cases; irrespective of the fact, that the declarant was under apprehension of death.

§ 717.<sup>2</sup> The persons whose declarations are thus admitted, are § 647 considered as standing in the same situation as if they were sworn, the danger of impending death being equivalent to the sanction of an oath. It follows, therefore, that when the declarant, if living, would have been incompetent to testify by reason of imbecility of mind, or tender age, his dying declarations are inadmissible.<sup>3</sup> On the other hand, as the testimony of an accomplice is admissible against his fellows, the dying declarations of a *felo-de-se* are admissible against one indicted for assisting the deceased in his self-murder.<sup>4</sup> And on the same ground, when a husband is charged with the murder of his wife, or a wife with the murder of her husband, the dying declarations of the deceased will be received.<sup>5</sup>

§ 718. It is essential to the admissibility of these declarations, § 648 first, that at the time when they were made the declarant should have been in *actual danger of death*; secondly, that he should then have had a *full apprehension of his danger*;<sup>6</sup> and lastly, that *death should have ensued*.<sup>7</sup> All these facts, therefore, must be

<sup>1</sup> 1 East, P. C. 353; 2 Johns. 35.

<sup>2</sup> Gr. Ev. § 157, in part.

<sup>3</sup> R. v. Pike, 3 C. & P. 598; R. v. Drummond, 1 Lea. 338. In this last case, the declaration of an attainted convict was rejected. This would no longer be a ground of objection. 6 & 7 V., c. 85, § 1.

<sup>4</sup> R. v. Tinckler, 1 East, P. C. 354.

<sup>5</sup> R. v. Woodcock, 1 Lea. 500; 1 East, P. C., 354, 356, S. C.; Stoop's case, Addis. 381.

<sup>6</sup> R. v. Cleary, 2 Fost. & Fin. 850.

<sup>7</sup> Sussex Peer., 11 Cl. & Fin. 108, 112, per Ld. Denman, who laid down the law as follows:—"With regard to declarations made by persons in extremis, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time, of the danger, and of death, such declarations can be received in evidence; but *all these things must concur* to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination."

proved to the satisfaction of the judge before the evidence will be received.<sup>1</sup> It is not, however, necessary that the declarant should have stated that he was speaking *under a sense of impending death*, provided it satisfactorily appears, in any mode, that the declarations were really made under that sanction; as for instance, if the fact can be reasonably inferred from the evident danger of the declarant,<sup>2</sup> or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction, or the like. In short, all the circumstances of the case may be resorted to, in order to ascertain the state of the declarant's mind.<sup>3</sup> The length of time which elapsed between the declaration and the death of the declarant, furnishes no rule for the admission or rejection of the testimony; though, in the absence of better evidence, it may serve as one of the exponents of the deceased's belief, that his recovery was or was not impossible. It is the *impression of impending death*,<sup>4</sup> and not the rapid succession of death in point of fact, which renders the testimony admissible. If, therefore, it appear that the deceased, at the time of the declaration, had *any* expectation or hope of recovery, however slight it may have been, and though death actually ensued within an hour afterwards, the declaration will be inadmissible.<sup>5</sup> On the other hand, a firm

<sup>1</sup> Ante, § 23.

<sup>2</sup> Gr. Ev. § 158, in part.

<sup>3</sup> See *R. v. Morgan*, 14 Cox, 337, per Denman, J. In *R. v. Bedingfield*, id. 341, Cockburn, C. J., declined to rely on such evidence. Sed qu.

<sup>4</sup> *R. v. Woodcock*, 1 Lea. 503; *R. v. John*, 1 East, P. C. 357, 358; *R. v. Bonner*, 6 C. & P. 386; *R. v. Van Butchell*, id. 631; *R. v. Mosley*, 1 Moo. C. C. 97; *R. v. Spilsbury*, 7 C. & P. 187, per Coleridge, J.; *R. v. Minton*, M'Nally, Ev. 386; *R. v. Scallan*, Craw. & D., Abr. C. 340. See *R. v. Nicolas*, 6 Cox, 121; *R. v. Qualter*, id. 357; *R. v. Perkins*, 9 C. & P. 395; 2 Moo. C. C. 135, S. C.

<sup>5</sup> *R. v. Forester*, 4 Fost. & Fin. 857, per Byles, J., where the law seems to have been laid down somewhat too strictly; 10 Cox, 368, S. C.

<sup>6</sup> *R. v. Welborn*, 1 East, P. C. 385; *R. v. Christie*, 2 Russ. C. & M. 754; *R. v. Jenkins*, 1 Law Rep., C. C. 187; 38 L. J., M. C. 82; 11 Cox, 250, S. C.; *R. v. Mackay*, 11 Cox, 148; *R. v. Hayward*, 6 C. & P. 157, 160; *R. v. Crockett*, 4 id. 544; *R. v. Fagent*, 7 id. 238; *R. v. Megson*, 9 id. 418. Where the words were, "I have no hope of recovering, unless it be the will of God," *R. v. Murphy*, Ir. Cir. R. 38, per Richards, B.; and, in another case, "I think myself in great danger," *R. v. Errington*, 2 Lew. C. C. 149, they were respectively held to be insufficient. See *R. v. Howell*, 1 C. & Kir. 689; 1 Den. 1, S. C.

belief that death is *impending*,<sup>1</sup>—by which is meant, not as was once thought,<sup>2</sup> that it will almost immediately follow, but that it will happen shortly in consequence of the injury sustained,<sup>3</sup>—will suffice to render the statement evidence, though the sufferer may subsequently express a hope of recovery,<sup>4</sup> or may chance to linger on for some days, or even for two or three weeks.<sup>5</sup>

§ 719. It is worthy of remark that in Scotland it is immaterial, except as regards the *weight* of the evidence, whether or not the declaration be made under the impression of impending death; but where a party has received a mortal wound, an account of the matter given by him at any time subsequent to the injury will be admissible in the event of his death, provided it were made seriously and deliberately, and whilst the deceased appeared to be aware of what he was doing, and in the possession of his faculties.<sup>6</sup>

§ 720.<sup>7</sup> The declarations of the deceased are admissible *only as to matters to which he would have been competent to testify*, if sworn in the cause. They must, therefore, in general narrate facts only, and not mere opinions;<sup>8</sup> and they must be confined to what is relevant to the issue. But it is not necessary that the examination of the deceased should have been conducted after

<sup>1</sup> *R. v. Goddard*, 15 Cox, 7, per Hawkins, J., and Baggallay, L. J.

<sup>2</sup> Per Hullock, B., in *R. v. Van Butchell*, 3 C. & P. 629, 631. See, also, *R. v. Forester*, 4 Fost. & Fin. 859, per Byles, J.; 10 Cox, 368, S. C.; *R. v. Osman*, 15 Cox, 1, per Lush, L. J.

<sup>3</sup> *R. v. Reaney*, Dear. & Bell, 151; 26 L. J., M. C. 43; 7 Cox, 209, S. C.

<sup>4</sup> *R. v. Hubbard*, 14 Cox, 565, per Hawkins, J.

<sup>5</sup> In *R. v. Woodcock*, 1 Lea. 500, the declarations were made two days before death; in *R. v. Bonner*, 6 C. & P. 386, three days; in *R. v. Whitworth*, 1 Fost. & Fin. 382, six days; in *R. v. Tinckler*, 1 East, P. C. 354, ten days; in *R. v. Reaney*, Dear. & Bell, 151; 26 L. J., M. C. 43; 7 Cox, 209, S. C.; in *R. v. Mosley*, 1 Moo. C. C. 97, eleven days; and in *R. v. Bernadotti*, 11 Cox, 316, coram Brett & Lush, Js., nearly three weeks; yet they were all received. In *R. v. Mosley*, and in *R. v. Whitworth*, it appeared that the surgeon did not think the case hopeless, and told the patient so: but the patient thought otherwise. See, also, *R. v. Peel*, 2 Fost. & Fin. 21; *R. v. Howell*, 1 C. & Kir. 689; 1 Den. 1, S. C.

<sup>6</sup> Alison, Pract. Cr. L. 510—512, 604—607; 2 Hume, Com. 391—393; 1 Dickson, Ev. 66, 67. The same law seems to have prevailed in England a century ago. See *R. v. Blandy*, 18 How. St. Tr. 1137.

<sup>7</sup> Gr. Ev. § 159, in part.

<sup>8</sup> *R. v. Sellers*, Carr. Cr. L.

the manner of interrogating a witness in the cause, though any departure from this mode may affect the credibility of the declarations. Therefore, in general, it is no objection to their *admissibility*, that they were made in answer to leading questions,<sup>1</sup> or obtained by earnest solicitation.<sup>2</sup> But where a statement, ready written, was brought by the father of the deceased to a magistrate, who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was rejected in Ireland by Mr. Justice Crampton, who observed that, "in the state of languor in which dying persons generally are, their assent could be easily got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true;" and his lordship added, "the magistrate should not have trusted to the relation of a third person, but should have taken down the deceased's declaration from her own lips, or at least have had it taken down in his presence."<sup>3</sup> When the declarations have been properly made, the right to offer them in evidence is not restricted to the prosecutor, but they are equally admissible in favour of the accused.<sup>4</sup>

§ 721.<sup>5</sup> Whatever the declaration may be, it must be *complete* in § 651 itself; for, if the dying man appears to have intended to qualify it by other statements, which he is prevented by any cause from making, it will not be received.<sup>6</sup> Again, it has been held in one case,—though with very questionable propriety so far as relates to the rejection of oral evidence,—that if the statement were *committed to writing* at the time it was made, this writing must be produced, or its non-production accounted for; and that neither a copy, nor parol evidence of the declaration, can be admitted in the first instance to supply the omission.<sup>7</sup> But where

<sup>1</sup> R. v. Smith, L. & Cave, 607; 10 Cox, 82; 34 L. J., M. C. 153, S. C.

<sup>2</sup> R. v. Fagent, 7 C. & P. 238; R. v. Reason, 1 Str. 499; 16 How. St. Tr. 1, 24, et seq., S. C.; Com. v. Vass, 3 Leigh, R. 786; R. v. Whitworth, 1 Fost. & Fin. 382.

<sup>3</sup> R. v. Fitzgerald, Ir. Cir. R. 168, 169.

<sup>4</sup> R. v. Scaife, 1 M. & Rob. 551; 2 Lew. C. C. 150, S. C. The same law prevails in Scotland, 2 Hume, Com. 393.

<sup>5</sup> Gr. Ev. § 159 & 161, in part.

<sup>6</sup> 3 Leigh, R. 797.

<sup>7</sup> R. v. Gay, 7 C. & P. 230, per Coleridge, J.; R. v. Reason, 16 How. St. Tr. 1, 24, et seq.; 1 Str. 499, S. C. But see ante, § 415.

three declarations had been made at different times on the same day, one of which was made under oath to a magistrate, and reduced to writing, but the other two were not, it was held that these last might be proved by parol, though the written statement was not produced.<sup>1</sup> If the deposition of the deceased has been taken under any of the statutes on that subject, and is inadmissible as such, for want of compliance with some of the legal formalities, it seems that it may still be treated as a dying declaration, if made in extremis.<sup>2</sup>

§ 722.<sup>3</sup> Though these declarations, when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, if precisely identified; it should always be recollected that the accused has not the *power of cross-examination*,—a power quite as essential to the eliciting of the truth as the obligation of an oath can be;—and that where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.<sup>4</sup>

<sup>1</sup> *R. v. Reason*, 16 How. St. Tr. 1, 24, et seq.; 1 Str. 499, S. C., Platt, C. J., dubit. See *R. v. Scallan*, Craw. & D., Abr. C. 340.

<sup>2</sup> *R. v. Woodcock*, 1 Lea. 502; *R. v. Callaghan*, McNally, Ev. 385.

<sup>3</sup> Gr. Ev. § 162, in great part.

<sup>4</sup> *Jackson v. Kniffen*, 2 Johns. 35, 36, per Livingston, J.; *R. v. Ashton*, 2 Lew. C. C. 147, per Alderson, B. See, also, Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255 (293); 2 St. Ev. 367, and 1 Ph. Ev. 292.

## CHAPTER XIV.

## ADMISSIONS.

§ 728.<sup>1</sup> UNDER the head of exceptions to the rule rejecting § 653 hearsay evidence, it has been usual to treat of *admissions and confessions*; considering them as declarations against interest, and, therefore, as probably true. But in regard to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a *substitute* for the ordinary and legal proof;<sup>2</sup> either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct. In this light confessions and admissions are regarded by the Roman law, as stated by Mascardus. *Illud igitur in primis, ut hinc potissimum exordiar, non est ignorandum, quod esti confessioni inter probationum species locum in præsentia tribuerimus; cuncti tamen fere Dd. unanimes sunt arbitrati, ipsam potius esse ab onere probandi relevationem, quam proprie probationem.*<sup>3</sup> Many admissions, however, being made by third persons, are receivable on mixed grounds; partly, as belonging to the *res gestæ*, partly,

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<sup>1</sup> Gr. Ev. § 169, verbatim.

<sup>2</sup> As to when the admissions of a party with respect to written instruments may be substituted for the ordinary proof of such instruments by their production, see ante, §§ 410—414.

<sup>3</sup> 1 Masc. de Prob. quæst. 7, n. 1, 10, 11; Menoch. de Præs., lib. 1, quæst. 61, n. 6; Alciat. de Præs., pars 2, n. 4. The Roman law distinguishes, with great clearness and precision, between confessions *extra judicium*, and confessions *in judicio*; treating the former as of very little and often of no weight, unless corroborated, and the latter as generally, if not always, conclusive, even to the overthrow of the *præsumptio juris et de jure*; thus constituting an

as made against the interest of the person making them, and partly, because of some privity with him against whom they are offered in evidence.

§ 724.<sup>1</sup> In our law, the term *admission* is usually applied to civil transactions, and to those matters of fact, in criminal cases, which do not involve criminal intent;<sup>2</sup> the term *confession* being generally restricted to *acknowledgments of guilt*. This distinction will be better understood by an example. Thus, on the trial of Lord Melville, who was charged, amongst other things, with criminal misapplication of moneys received from the Exchequer, the admissions of his agent and authorised receiver was held sufficient proof of the fact of such agent having received the public money; though had such admission been tendered in evidence to establish the charge of any misapplication of the money by the noble defendant, it would clearly have been rejected. The law was thus stated by Lord Chancellor Erskine:—"This first step in the proof" (namely, the receipt of the money by the agent,) "must advance by evidence applicable alike to civil, as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime."<sup>3</sup>

§ 724A. As the rules of evidence, respectively applicable to

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exception to the conclusiveness of this class of presumptions. But to give a confession this effect, certain things are essential, which Mascardus cites out of Tancred:—

"Major, spontè, sciens, contra se, ubi jus fit;  
Nec natura, favor, lis, jusve repugnet, et hostia."

Masc. ub. supr. n. 15; Vid. Dig. lib. 42, tit. 2, de confessis. Cod. lib. 7, tit. 59; Van. Leeuw. Comm. book v. ch. 21.

<sup>1</sup> Gr. Ev. § 170, almost verbatim.

<sup>2</sup> *Ld. Melville's trial*, 29 How. St. Tr. 746—764.

<sup>3</sup> 29 How. St. Tr. 764.



admissions and confessions, differ in some respects, the two subjects will be discussed in separate chapters. And with regard to ADMISSIONS, it will first be convenient to refer to a practice, which of late years has greatly prevailed, of making solemn admissions before a trial for the purpose of dispensing with formal proof. The law on this subject,—after several changes,<sup>1</sup>—is now embodied in the Rules of the Supreme Court, 1883, Order XXXII. Rule 1 of that Order provides in general terms, that “Any party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.”<sup>2</sup>

R. 2,—which is almost a re-enactment of the old law,—is confined to the admission of *documents*, and with this view it provides, that “Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.”

R. 3 furnishes a form of “notice to admit documents,” in which

<sup>1</sup> See Reg.-Gen. 2 W. 4, reported in 3 B. & Ad. 392, 393; Reg.-Gen., H. T., 4 W. 4, r. 20, reported in 4 B. & Ad., xvii., xviii.; Reg.-Gen., H. T., 1853; 15 & 16 V., c. 76, §§ 117, 118; 16 & 17 V., c. 113, § 118, Ir.; Rules of Sup. Ct. 1875, Ord. XXXII., rr. 1 4. For the practice on the Revenue side of the Queen's Bench Division, see Reg.-Gen., 24 V., r. 17; 6 H. & N. xiii. And also, in proceedings under the Public Worship Registration Act, 1874, 37 & 38 V., c. 85, see Reg.-Gen., 22 Feb., 1879, r. 46, and Form 39, cited, L. R., 4 P. D. 261, 284. So, too, in the Court of Probate, see Rules of 1862, for Ct. of Prob. in contentious business, r. 72, and Form No. 20. The Rules of 1865, 1869, 1875, 1877, and 1880, for the Ct. of Div. & Mat. Causes, are, for some unaccountable reason, silent on the subject.

<sup>2</sup> If a defendant, in an action of salvage, admits all the facts pleaded in the statement of claim, the plaintiff cannot call evidence in support of any additional facts, except by leave of the court, and on special grounds. The *Hardwick*, L. R., 9 P. D. 32; 53 L. J., P. D. & A. 23, per Sir James Hannen, S. C.



R. 4 is one of an experimental nature, and it may, or may not, attain its object, viz., that of diminishing the expense at the trial. It has thus been framed:—"Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any *specific fact or facts* mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice: provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."

R. 5 provides, that "A notice to admit facts shall be in the

## COPIES.

Description of Documents.	Dates.	Original or Duplicates served, sent, or delivered, when, how, and by whom.
Register of baptism of A.B. in the parish of X. Letter—plaintiff to defendant . . . . .	January 1, 1848. February 1, 1848 . . .	Sent by General Post, February 2, 1848. Served March 2, 1848, on defendant's attorney by E. F., of—
Notice to produce papers	March 1, 1848 . . . . .	
Record of a judgment of the court of Queen's Bench in an action, F. S. v. F. N. . . . .	Trinity Term, 10th Vict.	
Letters Patent of King Charles II. in the Rolls Chapel . . . . .	January 1, 1680.	

Form No. 12, in Appendix B., and admissions of facts shall be in the Form No. 13 in Appendix B., with such variations as circumstances may require." <sup>1</sup>

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## No. 12.

## NOTICE TO ADMIT FACTS.

[Heading as in Form 11, *ante*, p. 636.]

Take notice that the plaintiff [*or defendant*] in this cause requires the defendant [*or plaintiff*] to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the defendant [*or plaintiff*] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Dated, &c.

G. D., solicitor [*or agent*] for the plaintiff [*or defendant*].

To E. F., solicitor [*or agent*] for the defendant [*or plaintiff*].

The facts, the admission of which is required, are—

1. That John Smith died on the 1st of January, 1870.
2. That he died intestate.
3. That James Smith was his only lawful son.
4. That Julius Smith died on the 1st of April, 1876.
5. That Julius Smith never was married.

## No. 13.

## ADMISSION OF FACTS, PURSUANT TO NOTICE.

[Heading as in Form 11, *ante*, p. 636.]

The defendant [*or plaintiff*] in this cause, for the purposes of this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this cause.

Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the defendant [*or plaintiff*] on any other occasion, or by anyone other than the plaintiff [*or defendant or party requiring the admission*].

Delivered, &c.

E. F., solicitor [*or agent*] for the defendant [*or plaintiff*].

To G. H., solicitor [*or agent*] for the plaintiff [*or defendant*].

Facts admitted.	Qualifications or limitations, if any, subject to which they are admitted.
1. That John Smith died on the 1st of January, 1870.	1.
2. That he died intestate.	2.
3. That James Smith was his lawful son.	3. But not that he was his only lawful son.
4. That Julius Smith died.	4. But not that he died on the 1st of April, 1876.
5. That Julius Smith never was married.	5.

R. 6 provides, that "any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just."

R. 7 provides, with respect to the mode of proof, that "an affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof be required;" and by virtue of R. 9, the costs occasioned by any notice to admit unnecessary documents, "shall be borne by the party giving such notice."

§ 724B. In contrasting Rules 2 and 4 as cited above, it will be seen that while the latter specifies the respective times allowable for giving notice to admit, and for admitting, *facts*, the former, which relates to *documents*, is silent on both those points. For this reason,—and indeed for many more, which will occur to an intelligent lawyer,—a reference to a few cases, which were decided on the construction of the former rules, may still be of service. And, § 704 first, it has been held, that, though the notice to admit documents must be given a reasonable time before trial, yet, where it was given to the defendant's agent in town only four days before the commission day at Newcastle,—and he two days afterwards refused to admit the documents without objecting to the sufficiency of the notice, or requiring further time,—the plaintiff was entitled to the costs of proof.<sup>1</sup> Secondly, though the admission be made "with a saving of all just exceptions," it so far recognises the general character and accuracy of the documents, that no objection can subsequently be taken to the *authenticity* of any part of them,<sup>2</sup> or to their reception in evidence on the ground of any interlineation, however material,

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<sup>1</sup> *Tinn v. Billingsley*, 2 C. M. & R. 253; 3 Dowl. 810, S. C.

<sup>2</sup> *Hawk v. Freund*, 1 Fost. & Fin. 294, per Byles, J.

appearing upon them.<sup>1</sup> If this were not so, great inconveniences would follow; for as one main object of inducing a party to admit under notice, is to dispense with the necessity of formal proof of the instrument, it would obviously open a door to fraud, if the party admitting were at liberty afterwards to object to an interlineation, which the attesting witness might alone be enabled to explain.<sup>2</sup> So, where a deed was admitted as "the counterpart of a lease," an objection taken at the trial, that it was in fact a lease, and as such inadmissible for want of a sufficient stamp,<sup>3</sup> was overruled; <sup>4</sup> and where a party admitted an instrument, which was specified in the notice as bearing date the 10th August, he was not allowed to call on his opponent for an explanation, though on the production of the instrument it was evident that the date "August" had been written on an erasure.<sup>5</sup>

§ 724c. Thirdly, a variance in the description of the document, § 705 if not of a nature to mislead, will not release the admitting party from his obligation; as, for instance, where the date of a promissory note, which was otherwise correctly described in the notice to admit, was misstated.<sup>6</sup> Fourthly, it seems that a party will not be entitled to the costs of proving any document specified in the notice, unless the witness called to establish this proof has, at least in his examination in chief, been questioned to no other fact.<sup>7</sup> Fifthly, when a notice is given to admit documents, all that can fairly be asked is, that the handwriting or due execution of the papers specified should be admitted; and, therefore, where a plaintiff included in his notice a demand to admit the authority by which the documents had been written, and afterwards, on the defendant refusing generally to make the admission as prayed, proved the documents at the trial, it was held that he could not recover from his opponent the costs of such proof.<sup>8</sup>

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<sup>1</sup> Freeman v. Steggall, 14 Q. B. 202.

<sup>2</sup> Id. 203, per Coleridge, J.

<sup>3</sup> See now 33 & 34 V., c. 97, § 93, and Sch. Tit. "Duplicate."

<sup>4</sup> Doe v. Smith, 8 A. & E. 255; 3 N. & P. 335; 2 M. & Rob. 7, S. C.

<sup>5</sup> Poole v. Palmer, C. & Marsh. 69, per Rolfe, B.

<sup>6</sup> Field v. Hemming, 7 C. & P. 619, per Ld. Abinger; 5 Dowl. 450, S. C., nom. Field v. Flemming; Bittleston v. Cooper, 14 M. & W. 399.

<sup>7</sup> Stracey v. Blake, 7 C. & P. 404, per Ld. Abinger.

<sup>8</sup> Oxford, Worc., & Wolverh. Ry. Co. v. Scudamore, 1 H. & N. 668.

§.724D. Sixthly, it is needless to show that the admitting party § 705 has actually examined the documents mentioned in the notice, if he has had an opportunity of doing so;<sup>1</sup> and it seems to be unnecessary to identify the document produced at the trial with the one inspected, provided that it corresponds with the description contained in the notice.<sup>2</sup> On two occasions, however, the necessity for such evidence was urged by counsel, if not acknowledged by the court;<sup>3</sup> and prudence may generally dictate the propriety of being prepared with such proof, or, at least, of having the documents that are to be produced signed or marked by the party making the admission. Seventhly, though the notice to admit contain no saving of all just exceptions, the party admitting may still rely on any valid objection to the admissibility of a document specified in it; and, therefore, where a plaintiff admitted that a paper was a copy of a letter from himself to a defendant, who had suffered judgment by default, this did not entitle the other defendant to put in the copy, without first accounting for the non-production of the original, or tracing it to the plaintiff's possession, and proving the notice to produce. The judge's order in that case, which served the same purpose as the present notice to admit, merely secured the accuracy of the secondary evidence, but did not give it the effect of primary proof.<sup>4</sup>

§ 724E. Lastly, Rule 2 extends to every document which a party § 708 purposes to adduce in evidence, whether or not it be in his custody or control,<sup>5</sup> and whether or not it be put in issue by the pleadings.<sup>6</sup> Neither will the case be varied though the opposite party may have already, irrespective of the notice, refused in positive terms to make any admission on the subject.<sup>7</sup> A party may even, as it

<sup>1</sup> *Doe v. Smith*, 8 A. & E. 264, 265, per Patteson and Coleridge, Js.

<sup>2</sup> *Id.* per Coleridge, J., who observed, that "to require such evidence would be multiplying proofs, so as to defeat the rule of court."

<sup>3</sup> *Clay v. Thackrah*, 9 C. & P. 53, coram Ld. Denman; *Doe d. Tindal v. Roe*, 5 Dowl. 420, per Ld. Abinger.

<sup>4</sup> *Sharpe v. Lamb*, 11 A. & E. 805, 807; 3 P. & D. 454, S. C. See *Goldie v. Shuttleworth*, 1 Camp. 70; *Rochfort v. Sedley*, 12 Ir. Law R., N. S., App. iv.

<sup>5</sup> *Rutter v. Chapman*, 8 M. & W. 388.

<sup>6</sup> *Spencer v. Barough*, 9 M. & W. 425.

<sup>7</sup> *Id.*

would seem, be served with notice to admit a foreign judgment, or other documents in a foreign court, provided that his opponent will give him time to inspect them abroad, and pay his expenses incurred in so doing.<sup>1</sup> Still, the rules do not apply where ancient records of a public nature require, not proof, but translation and explanation, or where affidavits which have been filed must be produced by an officer; and, consequently, a plaintiff was held entitled to the costs, both of a witness who was called to explain and translate the records, and of an officer of the Court of Chancery who produced the affidavits, though the defendant had not been called upon to admit any one of these documents.<sup>2</sup>

§ 724f. In consenting to admit for the purposes of a trial, care must be taken, lest, by the words used in the notice to admit, the party admitting should be entrapped into making a larger admission than he intended. The defendant fell into this error in the case of *Chaplin v. Levy*.<sup>3</sup> There the holder of a bill of exchange sued the acceptor, and the defendant's solicitor wrote a letter admitting "that the acceptance to the bill on which the action is brought is in the defendant's handwriting." A plea denying the acceptance was afterwards pleaded, but the court held that, notwithstanding this plea, the admission contained in the letter established a *prima facie* case on behalf of the plaintiff without the production of the bill itself at the trial. In the case of *Wilkes v. Hopkins*, a similar mistake was made.<sup>4</sup> That was an action against three persons on a bill of exchange alleged to have been accepted by them under the style of "The Newbridge Coal Company." The acceptance was traversed by two of the defendants, while the third one, Bishop, who had actually signed the acceptance for the company, suffered judgment by default. At the trial, the two defendants who had pleaded, denied that Bishop had any authority to accept for them; but as the notice to admit stated the bill to have been "accepted by Bishop *for the defendants* as the Newbridge

<sup>1</sup> *Smith v. Bird*, 3 Dowl. 641.

<sup>2</sup> *Bastard v. Smith*, 10 A. & E. 213.

<sup>3</sup> 9 Ex. R. 531.

<sup>4</sup> 1 Com B. 737. See, also, *Hunt v. Wise*, 1 Fost. & Fin. 445.



Coal Company," the court held, that an admission under this notice, not only acknowledged the signature of Bishop, but precluded the defendants from denying that he had authority to bind them by his acceptance. This last decision is certainly one *strictissimi juris*; and probably it would not be upheld at the present day.<sup>1</sup>

§ 724a. In the County Courts the rule which governs notices to admit is as follows:—"Where a party desires to give in evidence any document, he may, not less than *five* clear days before the trial, give notice<sup>2</sup> to any other party in the action who is competent to make admissions, requiring him to *inspect and admit* such document; and if such other party shall not within *three* days after receiving such notice make such admission, any expense of proving the same at the trial shall be paid by him, whatever be the result of the action, unless the court shall otherwise order; and no costs of proving any document shall be allowed unless such notice shall be given, except in cases where, in the opinion of the registrar, the omission to give such notice has been a saving of expense."<sup>3</sup>

§ 725. Having now explained the practice relating to notices to admit, it will be convenient to discuss the general law of admissions; and here, the *first rule* important to be borne in mind, is, that *the whole statement containing the admission must be taken together*; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true; yet, unless the whole is received, the true meaning of the party, which is evidence against him, cannot be ascertained.<sup>4</sup> But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally

<sup>1</sup> See *Pilgrim v. Southampton & Dorchester Ry. Co.*, 18 L. J., C. P. 330.

<sup>2</sup> C. C. R., 1876, Form 288. This Form is the same as Form 11 of the Rules of the Supreme Court, cited ante, p. 636.

<sup>3</sup> C. C. R., 1875, Ord. XIII., r. 9.

<sup>4</sup> *Thomson v. Austen*, 2 D. & R. 361, per Abbott, C. J.; *Fletcher v. Froggatt*, 2 C. & P. 566, per id.; *Cobbett v. Grey*, 4 Ex. R. 729.

deserving of credit; but the jury must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those making against him.<sup>1</sup>

§ 726. This rule, simple as it appears, is not without difficulty ‡ 656 in its practical application; and it will therefore be convenient briefly to refer to a few of the leading decisions on the subject. And, first, the rule *applies equally to written, as to verbal, admissions*; and, consequently, where a defendant has rendered a debtor and creditor account to the plaintiff, which the latter produces in proof of his demand, it will be equally admissible in evidence of the defendant's set-off;<sup>2</sup> though the plaintiff will be at liberty, while relying on the creditor side of the account, to impeach items which appear on the debtor side.<sup>3</sup> Where, however, to an action on an attorney's bill of costs, the defendant pleaded a set-off, and put in an account furnished to him by the plaintiff, in which the plaintiff credited himself for the amount of his bill, and debited himself for the amount of goods sold, the court held that the defendant could not exclude from the consideration of the jury so much of the account as related to the bill of costs, on the ground that no signed bill had been delivered; because the non-delivery of a signed bill does not bar the debt, but merely, if insisted on, prevents its recovery by action.<sup>4</sup>

§ 727. When, under the old system of pleading and practice, the ‡ 657 admission was contained in an affidavit, a written examination,<sup>5</sup> a

<sup>1</sup> *Bermon v. Woodbridge*, 2 Doug. 788, per Ld. Mansfield; *Smith v. Blandy*, Ry. & M. 259, per Best, C. J.; *Cray v. Halls*, cited id. 258, per Abbott, C. J. See, also, *Whitwell v. Wyer*, 11 Mass. 6, 10; *Garey v. Nicholson*, 24 Wend. 350; *Kelsey v. Bush*, 2 Hill, S. Car. R. 440.

<sup>2</sup> *Randle v. Blackburn*, 5 Taunt. 245.

<sup>3</sup> *Rose v. Savory*, 2 Bing. N. C. 145; 2 Scott, 199, S. C. See *Moorhouse v. Newton*, 3 De Gex & Sm. 307.

<sup>4</sup> *Harrison v. Turner*, 10 Q. B. 482.

<sup>5</sup> In *Prince v. Samo*, 7 A. & E. 630, Coleridge, J., asked whether the question had ever been decided as to depositions? To which the counsel replied that no express decision had been found.

signed pleading,<sup>1</sup> an answer,<sup>2</sup> or plea,<sup>3</sup> in Chancery, or other document complete in itself, the whole document was required to be read, though the jury were not bound to give equal credit to every part of it, and they frequently lent an academic faith to such portions as made in favour of the declarant.<sup>4</sup> So stringent was this rule, that where, on exceptions taken, a second answer to a bill in equity had been sent in, the defendant was allowed to insist upon having that also read, in order to explain what he had sworn in his first answer.<sup>5</sup> It has also been held that a party, against whom an answer in Chancery was produced, might have the whole bill read as part of his adversary's case, on the ground that this was like the ordinary case of a conversation, where the answers of a party could not be given in evidence against him without also proving the questions which drew forth the answers.<sup>6</sup> The jury, however, might in such case be warned, that the statements in the bill were not admissions of the facts contained therein; it being notorious that allegations, not consistent with fact, were frequently introduced into a bill, for the sole purpose of eliciting truth from the opposite party.<sup>7</sup>

§ 728. In *Goss v. Quinton*,<sup>8</sup> where the plaintiffs, who were assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners, as proof that he had taken certain property, the court held that they thereby made his

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<sup>1</sup> *Marianski v. Cairns*, 1 Macq. Sc. Cas. H. of L. 212. In the Supreme Court the rule respecting the signing of pleadings, is as follows:—"Signature of counsel shall not be necessary; but when pleadings have been settled by counsel or a special pleader, they shall be signed by him; and if not so settled, they shall be signed by the solicitor, or by the party if he sues or defends in person." Sup. Ct. Rules, 1883, Ord. XIX., R. 4.

<sup>2</sup> See Cons. Ord. Ch. 1860, Ord. xv., rr. 5, 6.

<sup>3</sup> Pleas in Chancery, where the matter of the plea did not appear upon record, must have been upon oath, and be signed by the parties pleading. Cons. Ord. Ch. 1860, Ord. xiv., rr. 2, 3.

<sup>4</sup> *Bermon v. Woodbridge*, 2 Doug. 788, per Ld. Mansfield; *Blount v. Burrow*, 4 Br. C. C. 75, per Ld. Hardwicke; *Baildon v. Walton*, 1 Ex. R. 617; *Percival v. Caney*, 4 De Gex & Sm. 623, 624, per Knight-Bruce, V.-C.

<sup>5</sup> *R. v. Carr*, 1 Sid. 418; *B. N. P.* 237; *Ld. Bath v. Bathersea*, 5 Mod. 10; *Lynch v. Clerke*, 3 Salk. 154.

<sup>6</sup> *Pennell v. Meyer*, 2 M. & Rob. 98, per Tindal, C. J.; 8 C. & P. 470, S. C.

<sup>7</sup> *Id.*

<sup>8</sup> 3 M. & G. 825.

cross-examination evidence in the cause; and as, in this cross-examination, the defendant had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as *some evidence* on his behalf of the agreement and its contents; and that too, though the absence of the document was not accounted for, nor had notice been given to the plaintiffs to produce it. So, where a magistrate was sued in trespass for assault and false imprisonment, the warrant of commitment put in evidence by the plaintiff was held to be admissible on behalf of the defendant, as proof of the information recited in it;<sup>1</sup> and in an action against a sheriff, where an undersheriff's letter was produced by the plaintiff to affect the defendant, it was held to be some evidence also of certain facts stated therein, which tender to excuse the sheriff.<sup>2</sup>

§ 729. The Case of *Bessey v. Windham*<sup>3</sup> purports to have been decided on the same principle. There, in order to fix a sheriff in an action of trespass, the plaintiff put in the warrant under which the seizure was made; and as this recited the writ of *fi. fa.*, the Court of Queen's Bench held that it was some evidence of the writ, and, consequently, that it tended to protect the sheriff, as showing that the seizure was made by the authority of the law. The Court of Common Pleas, however, on a more recent occasion,<sup>4</sup> has questioned this decision, on the ground that the warrant was offered in evidence, not as proof of the facts recited in it, but merely to show that the sheriff had ordered the goods in question to be seized. And it seems to be now tolerably clear from several authorities, that where a sheriff or bailiff seeks to justify a seizure as against any party but the execution-debtor, he must produce both the writ of execution and the judgment, and he cannot be

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<sup>1</sup> *Haylock v. Sparke*, 22 L. J., M. C. 67; 1 E. & B. 471, S. C. This case seems to overrule *Stephens v. Clark*, 2 M. & Rob. 435, per Cresswell, J.

<sup>2</sup> *Haynes v. Hayton*, 6 L. J., K. B. (O. S.), 231, recognised in *Bessey v. Windham*, 6 Q. B. 172.

<sup>3</sup> 6 Q. B. 166. See *Ogden v. Hesketh*, 2 C. & Kir. 772.

<sup>4</sup> *White v. Morris*, 11 Com. B. 1015. See, also, *Bowes v. Foster*, 27 L. J., Ex. 263, per Watson, B.

relieved from offering such proof, by any recital in the warrant which his opponent may put in evidence.<sup>1</sup>

§ 730. The rule requiring the whole statement containing the admission to be taken together, has long prevailed to a considerable extent in equity; and therefore, where a defendant had been examined on two days before commissioners of the Court of Bankruptcy, and the plaintiff read the examination taken on the first day, he was compelled to read that also which was taken on the second day;<sup>2</sup> and where a plaintiff in equity read that part of the defendant's account-book, which charged the latter, the defendant was allowed to read the discharging part as evidence for himself.<sup>3</sup> With respect, however, to the old *answers* and *examinations in Chancery*,—which have now been superseded by *statements of defence* and *answers to interrogatories*,—the equity rule was far less comprehensive than that which was recognised at common law; and although, if a party in equity admitted in his examination or answer, that he had received a sum, and then added in the same sentence that he had immediately paid it away,—or if he stated in a still more general form, that a person gave him 100*l.* as a present,—the charge and the discharge would be so blended together, that the one could not be admissible without the other;<sup>4</sup> still, if he once admitted the receipt of money as an independent fact, he could not refer to other parts of his examination or answer, much less to affidavits sworn by him, or to schedules attached to his answer, for the purpose of showing that he had liquidated the amount so admitted to have been received, by separate and independent payments.<sup>5</sup> So, if a plaintiff read a passage in the answer

<sup>1</sup> *White v. Morris*, 11 Com. B. 1015; *Glave v. Wentworth*, 6 Q. B. 173, n. per Parke, B.; *Martin v. Podger*, 5 Burr. 2631; *Lake v. Billers*, 1 Ld. Ray. 733.

<sup>2</sup> *Smith v. Biggs*, 5 Sim. 391, per Shadwell, V.-C.  
<sup>3</sup> *Carter v. Ld. Coleraine*, cited in 2 Ball & B. 384; *Blount v. Burrow*, 4 Br. C. C. 75, per Ld. Hardwicke.

<sup>4</sup> *Ridgeway v. Darwin*, 7 Ves. 404, per Ld. Eldon; *Thompson v. Lambe*, id. 588, per id.; *Robinson v. Scotney*, 19 id. 584, per Sir W. Grant, M. R.; B. N. P. 237. See, also, *Awdley v. Awdley*, 2 Vern. 194; *Hampton v. Spencer*, id. 288; *Freeman v. Tatham*, 5 Hare, 329.

<sup>5</sup> Cases cited in last note.

as evidence of a particular fact, the defendant could not read other parts, even though grammatically connected with such passage by conjunctive particles, unless they were really explanatory of its meaning;<sup>1</sup> and if, in order to understand the sense of the passage on which the plaintiff relied, it was necessary to read on the part of the defendant other portions of the answer, still these portions would be evidence only so far as they were explanatory; and any new facts introduced therein, though so immediately connected with the parts admitted as to be incapable of subtraction, would be considered as not read.<sup>2</sup> This rule seems to have been adopted in consequence of the subtle contrivances of equity draftsmen, whose skill formerly consisted in so grammatically blending important points of the defendant's case with admissions that could not be withheld, as to render it necessary that both should be read in conjunction, and thus to prove their client's case by means of his own unsupported statements.<sup>3</sup> The oats and tares were reaped together.

§ 731. In accordance with the practice in equity as explained in the preceding section, the Rules of the Supreme Court, 1883, have provided by Order XXXI., Rule 24, that "any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last mentioned answers ought not to be used without them, he may direct them to be put in."

§ 732. Though the whole of a document may, as a general rule, § 661 be read by the one party, when the other has already put in evidence a partial extract,<sup>4</sup> this rule will not warrant the reading of

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<sup>1</sup> *Davis v. Spurling*, 1 Russ. & Myl. 68, per Leach, M. R.

<sup>2</sup> *Bartlett v. Gillard*, 3 Russ. 156, per Ld. Eldon.

<sup>3</sup> *Gresl. Ev.* 13.

<sup>4</sup> *R. v. Queen's Cy. Js.*, re Feehan, 10 L. R. Ir. 294.

*distinct entries* in an account-book,<sup>1</sup> or distinct paragraphs in a newspaper,<sup>2</sup> unconnected with the particular entry or paragraph relied on by the opponent; nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation-books, or a series of copies of letters inserted in a letter-book, merely because the adversary has read therefrom one or more papers, or entries, or letters.<sup>3</sup> If, indeed, the extracts put in expressly refer to other documents, these may be read also; but the mere fact, that the remaining portions of the papers or books may throw light on the parts selected by the opposite party, will not be sufficient to warrant their admission; for such party is not bound to know whether they will or not; and moreover, the light may be a false one.<sup>4</sup>

§ 733. The same rule prevails in the case of a *conversation*, in which several distinct matters have been discussed; and although it was at one time held, on high authority, that if a witness were questioned as to a statement made by an adverse party, such party might lay before the court the whole that was said by him in the same conversation, even matter not properly connected with the statement deposed to, provided only that it related to the subject-matter of the suit:<sup>5</sup> yet, a sense of the extreme injustice that might result from allowing such a course of proceeding, has induced the courts, in later times, to adopt a stricter rule; and if a part of a conversation is now relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may explain or qualify the matter already before the court.<sup>6</sup> The case in which this decision was pronounced admirably illustrates its propriety and justice. It was an action against the defendant for having maliciously arrested the plaintiff for debt, the plaintiff contending that the advance had been a gift and not a loan. A

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<sup>1</sup> *Catt v. Howard*, 3 Stark. R. 6, per Abbott, C. J.; *Reeve v. Whitmore*, 2 Drew. & Sm. 446.

<sup>2</sup> *Darby v. Ouseley*, 1 H. & N. 1.

<sup>3</sup> *Sturge v. Buchanan*, 10 A. & E. 598; 2 M. & Rob. 90, S. C.

<sup>4</sup> *Id.* 600, 605, per Ld. Denman.

<sup>5</sup> *The Queen's case*, 2 B. & B., 297, 298, per Abbott, C. J.

<sup>6</sup> *Prince v. Samo*, 7 A. & E. 627, 634, 635.

witness for the plaintiff acknowledged on cross-examination, that he had heard the plaintiff admit on oath, that he had repeatedly been insolvent, and had been remanded by the Insolvent Debtors' Court; whereupon he was asked in re-examination whether the plaintiff had not, on the same occasion, expressly stated that the money was given to him, and not lent. The court, in holding that the answer to this question was not evidence, observed, that if it were, "the jury would be bound to consider it, and might give full effect to it, and thus award large damages for an injury, of which no particle of proof could be found but the plaintiff's own assertion;" and they added, that "the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested."<sup>1</sup>

§ 734. With regard to *letters*, it has been held that a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production; because, in such a case, the letters to which those put in were answers are in the adversary's hands, and he may produce them, if he thinks them necessary to explain the transaction.<sup>2</sup> But if a plaintiff puts in a letter by the defendant, on the back of which is something written by himself, the defendant is entitled to have the whole read;<sup>3</sup> and where a defendant laid before the court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the last letter of the plaintiff, it being considered as a part of an entire correspondence.<sup>4</sup>

§ 735. Questions not unfrequently arise as to the admissibility of letters, account-books, &c., which are tendered as admissions, in cases where their existence or contents have been discovered by means of a compulsory examination or answer of the party either in previous bankruptcy proceedings, or in some other legal inquiry;

<sup>1</sup> Prince v. Samo, 7 A. & E. 627, 634, 635.

<sup>2</sup> *Ld. Barrymore v. Taylor*, 1 Esp. 326, per *Ld. Kenyon*; *De Medina v. Owen*, 3 C. & Kir. 72, per *Parke*, B.

<sup>3</sup> *Dagleish v. Dodd*, 5 C. & P. 238, per *Taunton*, J.

<sup>4</sup> *Roe v. Day*, 7 C. & P. 705, per *Park*, J.



and it is often contended in such cases that the documents cannot be read, without first producing the examination or answer. On one or two occasions at *Nisi Prius*, this objection has prevailed;<sup>1</sup> but the judges in *Banc* have since decided that,—whatever the correct doctrine may be with respect to documents referred to in an examination or answer, and actually *annexed* thereto,—no rule of law will, in other cases, compel a party to treat the document on which he relies as part of a previous examination or answer.<sup>2</sup> “It was surmised,” said Lord Denman,—while pronouncing the judgment of the court in *Sturge v. Buchanan*,—“that an unfair advantage had been taken of the defendant in obtaining a knowledge of these letters through a suit in Chancery, and then producing them without the answers, which may have greatly qualified and altered their effect. But I cannot think that a judge at *Nisi Prius* has anything to do with these considerations: he is to inquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved.”<sup>3</sup>

§ 736. Lord Tenterden has even expressed a doubt whether, in § 665 the event of a document being annexed to an old answer in Chancery, the answer need be read, if it have no connexion with the cause in which the document is produced.<sup>4</sup> If, however, the letter in question be not written by the party against whom it is offered, though contained in the schedule of his answer, and if it be merely used against him, as raising an inference from possession that he knew of its contents, and had acted upon it, common fairness seems to dictate,—in conformity with a decision of Chief Justice Tindal,<sup>5</sup>—that the letter should not be read without the answer; for the answer of the party might contain such an explanation of the circumstances under which the letter came into his possession, as also such a contradiction of any passages in it which seemed to bear against his

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<sup>1</sup> *Yates v. Carnsew*, 3 C. & P. 99, per *Ld. Tenterden*; *Holland v. Reeves*, 7 C. & P. 36, per *Alderson*, B.

<sup>2</sup> *Long v. Champion*, 2 B. & Ad. 284; *Sturge v. Buchanan*, 10 A. & E. 605.

<sup>3</sup> 10 A. & E. 605.

<sup>4</sup> *Long v. Champion*, 2 B. & Ad. 286.

<sup>5</sup> *Hewitt v. Piggott*, 5 C. & P. 75, 77.

rights, as utterly to neutralise its effect. If a party, while making a verbal admission, refers to a written paper, without which the admission is incomplete, the paper should be produced, before the statement can be used as evidence against him.<sup>1</sup>

§ 737.<sup>2</sup> Where the admission, whether oral or in writing, contains matters stated as *mere hearsay*, it may be questionable whether such matters can be received in evidence. If tendered against the party making the statement, they are clearly entitled to very little weight, and unless coupled with a further admission, that he believes them to be true, they would seem, like hearsay declarations against interest,<sup>3</sup> to be inadmissible. But does the same rule hold, when they are offered in favour of the party making the admission, as tending to explain the statement which tells against him? Mr. Justice Chambre on one occasion thought that it did, contending that where a party had read a part of the answer which his opponent had pleaded to a bill filed for discovery, "he did not thereby admit as evidence all the facts which happened to have been stated therein by way of hearsay only."<sup>4</sup> Notwithstanding this authority, it may perhaps be urged with success, that, since the answer in that case was offered as the admission of the party against whom it was read, the whole should have been laid before the jury, for the purpose of showing under what impressions the admission was made, though some part of it were stated only upon hearsay and belief.

§ 738. The rule requiring the whole admission to be taken together is so important, that the judge will do well to explain distinctly to the jury its bearing and extent, whenever any portion of the statement is favourable to the party against whom it is read; but his neglecting to do so in a case where it is clear that the jury,

<sup>1</sup> *Jacob v. Lindsay*, 1 East, 460; *Falconer v. Hanson*, 1 Camp. 171; 1 Ph. Ev. 341.

<sup>2</sup> Gr. Ev. § 202, in part.

<sup>3</sup> *Ld. Trimblestown v. Kemmis*, 9 Cl. & Fin. 780, 784—786; ante, § 685.

<sup>4</sup> *Roe v. Ferrars*, 2 B. & P. 548.

in fact, took the whole into their consideration, will not amount to such a misdirection as to warrant a new trial.<sup>1</sup>

§ 739. A second rule respecting admissions is, that they are receivable in evidence *though they relate to the contents of a written instrument*, even when such contents are directly in issue;<sup>2</sup> but as this rule has already been discussed, it is needless to do more in this place than thus shortly to refer to it.<sup>3</sup> The Courts recognise a third rule, in rejecting, or, at least, in placing no reliance upon, any verbal admissions or declarations of the parties, *which are not put directly in issue by the pleadings*, and which, consequently, have not been open to explanation or disproof.<sup>4</sup> This doctrine rests upon the ground, that the reception of such evidence would facilitate the production of false testimony;<sup>5</sup> and although it does not strictly extend to *written* admissions, yet the fact of their not being put in issue by the pleadings will naturally detract from their weight, as the party against whom they are offered in evidence will, in such case, have had no opportunity of explaining them.<sup>6</sup> § 668

§ 740.<sup>7</sup> With respect to the *person, whose admissions may be received*, the general doctrine is, that the declarations of a *party to the record*, or of one *identified in interest with him*, are, as against such party, receivable in evidence;<sup>8</sup> but if they proceed from a stranger, who is still living, they are almost uniformly rejected;<sup>9</sup> § 669

<sup>1</sup> *Beckham v. Osborne*, 6 M. & Gr. 771.

<sup>2</sup> *Slatterie v. Pooley*, 6 M. & W. 664.

<sup>3</sup> *Ante*, §§ 410—415. See, also, *ante*, § 413, as to the admissibility of a *confessio juris*.

<sup>4</sup> *Austin v. Chambers*, 6 Cl. & Fin. 1, 38, 39; *Attwood v. Small*, *id.* 234; *Copland v. Toulmin*, 7 *id.* 350, 373, 375.

<sup>5</sup> 6 Cl. & Fin. 39, per *Ld. Cottenham*.

<sup>6</sup> *McMahon v. Burchell*, 2 Phil. 127, 132, 133; 1 *Coop. R. temp. Ld. Cottenham*, 475, S. C., and cases cited in n.; *Crosbie v. Thompson*, 11 Ir. Eq. R. 404, per *Brady, C.*; *Swift v. M'Tiernan*, *id.* 602, per *id.*; *Malcolm v. Scott*, 3 Hare. 39, 63; and see *Margareson v. Saxton*, 1 Y. & C., Ex. R. 529; *Fitzgerald v. O'Flaherty*, 2 Moll. 394, n.; and *Steuart v. Gladstone*, 47 L. J., Ch. 423, per *Fry, J.*; L. R., 10 Ch. D. 626, 644, S. C.

<sup>7</sup> Gr. Ev. § 171, in part.

<sup>8</sup> *Spargo v. Brown*, 9 B. & C. 938, per *Bayley, J.*

<sup>9</sup> *Barough v. White*, 4 B. & C. 328, per *Littledale, J.* As to when they are admissible, see *post*, §§ 759—765.

and, though he be dead, they cannot in general be admitted, unless upon some of the special grounds already considered.<sup>1</sup> In holding that the admissions of parties to the record are receivable in evidence, it matters not whether such admissions were made before or after the party had arrived at full age; and, therefore, if an action be brought against an adult for necessities supplied to him during his minority, admissions made, and letters written, by him while under age, may be proved on behalf of the plaintiff.<sup>2</sup>

§ 741. Contrary to the practice which formerly prevailed at common law, the courts now recognise a wide distinction between *nominal* and *real* parties; and, therefore, if the consignee of goods uses the name of the consignor in proceeding against a shipper, or if the assignee of a bond sues the obligor in the name of the original obligee, or if the cestui que trust brings an action in the name of his trustee, Courts of Nisi Prius, recognising the principles of equity, will reject the admission of the nominal plaintiff as evidence for the defendant.<sup>3</sup> Thus, although a receipt in full may have been given by the nominal plaintiff to the defendant, the parties really interested may show to the jury that the money has in fact never been paid:<sup>4</sup> and if a release from a nominal plaintiff were pleaded in bar, a prior assignment of the cause of action, with notice thereof to the defendant, and an averment that the suit was prosecuted by the assignee for his own benefit, would be a good answer. Nor would the nominal plaintiff be permitted, in any manner, injuriously to affect the rights of his assignee in an action.<sup>5</sup>

§ 742. Again, the declaration of a *prochein amy* or *guardian* will not be receivable in evidence, because these persons, though their

<sup>1</sup> Ante, § 607.

<sup>2</sup> O'Neill v. Read, 7 Ir. Law R. 434. See 37 & 38 V., c. 62.

<sup>3</sup> See Payne v. Rogers, 1 Doug. 407; Legh v. Legh, 1 B. & P. 447; Innell v. Newman, 4 B. & A. 419; Hickey v. Burt, 7 Taunt. 48; Mounstephen v. Brooke, 4 Chit. R. 390; Manning v. Cox, 7 Moore, 617; Barker v. Richardson, 1 Y. & J. 362; Johnson v. Holdsworth, 4 Dowl. 63.

<sup>4</sup> See Wallace v. Kelsall, 7 M. & W. 273, 274, per Parke, B., explaining the decisions in Skaife v. Jackson, 3 B. & C. 421, and Farrar v. Hutchinson, 9 A. & E. 641; 1 P. & D. 437, S. C.

<sup>5</sup> See Welch v. Mandeville, 1 Wheat. 233; Mandeville v. Welch, 5 Wheat. 277, 283.

names appear on the record, are not in fact parties to the action, but are considered as officers of the court specially appointed by the judges to look after the interests of the infant.<sup>1</sup> A solemn admission, however, made by a guardian or prochein amy in good faith in a pending suit, for the purpose of that trial only, is governed by other considerations, and will be equally admissible with like admissions made by the solicitor in the cause.<sup>2</sup>

§ 743. When several persons are *jointly* interested in the subject-matter of the suit, the general rule is, that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favour of or against one or more of them separately; provided the admission relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.<sup>3</sup> Thus, the representation or misrepresentation of any fact made by one partner, with respect to some partnership transaction, will bind the firm;<sup>4</sup> and if partners bring an action as on a joint contract, an admission by one of them that the subject-matter of the contract was his separate property, will render the plaintiffs liable to a nonsuit,<sup>5</sup> unless the case be such as to warrant an amendment at the trial under Order XVI. R. 11, of the Supreme Court Rules, 1883.<sup>6</sup> So, where it appeared on the record, that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, statements made by one of such proprietors were admitted on the part of the defendant.<sup>7</sup> And where

<sup>1</sup> *Eccleston v. Speke*, alias *Petty*, 3 Mod. 258; *Cowling v. Ely*, 2 Stark. R. 366, per Abbott, J.; *Webb v. Smith*, Ry. & M. 106, per Littledale, J.; *Morgan v. Thorne*, 7 M. & W. 408, per Parke, B.; *Sinclair v. Sinclair*, 13 M. & W. 640, 646; *Eccles v. Harrison*, 6 Ec. & Mar. Cas. 204. These cases overrule *James v. Hatfield*, 1 Str. 548. See *Doe v. Roberts*, 16 M. & W. 778, cited ante, § 605.

<sup>2</sup> See post, § 772.

<sup>3</sup> *Whitcomb v. Whiting*, 2 Doug. 652; 1 Smith, L. C. 555, S. C.; *Wood v. Braddick*, 1 Taunt. 104,

<sup>4</sup> *Rapp v. Latham*, 2 B. & A. 795; *Thwaites v. Richardson*, Pea. R. 16; *Nicholls v. Dowding*, 1 Stark. R. 81, per Ld. Ellenborough.

<sup>5</sup> *Lucas v. De la Cour*, 1 M. & Sel. 249.

<sup>6</sup> Cited ante, § 223.

<sup>7</sup> *Kemble v. Farren*, 3 C. & P. 623, per Tindal, C. J.

the obligee of a bond filed a bill against two joint and several obligors, alleging that the bond had been delivered up to one of them by mistake, and praying that he, the obligee, might recover the amount due on it, an admission by the party to whom the bond was given up, that it had been delivered to her by mistake, was held to be evidence against the co obligor, though the joint answer of the defendants had traversed the allegation as to mistake, and, simply admitting the delivery of the bond, had stated that the party to whom it was given up had destroyed it.<sup>1</sup>

§ 744. This doctrine, however, has been much restricted by the Legislature, and is now rendered wholly inapplicable to cases where joint, or joint and several, debts have been barred by the Statute of Limitations. The first blow aimed at the rule was struck by Lord Tenterden's Act,<sup>2</sup> which,—after enacting that “in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments” contained in the old Statute of Limitations,<sup>3</sup> or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed *by the party chargeable thereby*,”—goes on to provide, “that where there shall be two or more joint-contractors, or executors or administrators of any contractor, no such joint-contractor, executor, or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: *Provided always, that nothing herein contained shall alter, or take away, or lessen the effect of, any payment of any principal or interest made by any person whatsoever*: provided also, that in actions to be commenced against two or more such joint-contractors, or executors, or administrators, if it shall

<sup>1</sup> Crosse v. Beddingfield, 12 Sim. 35.

<sup>2</sup> 9 G. 4, c. 14, § 1. See ante, § 600. Similar restrictions prevail in Ireland; see 16 & 17 V., c. 113, § 24; and in Massachusetts; see Rev. Stat. c. 120, § 14.

<sup>3</sup> 21 J. 1, c. 18.

<sup>4</sup> See ante, §§ 600, 601.

appear at the trial, or otherwise, that the plaintiff, though barred by" the said Act of Jac. 1,<sup>1</sup> "or this Act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled against any other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff<sup>2</sup>

§ 745. This enactment was open to two objections ; for, in the first place, it required that the written acknowledgment should be *personally* signed by the party chargeable ; and next, it left untouched the law which allowed part payment by one of several co-debtors to operate as a bar of the statute with respect to the others. These defects caused much litigation, and not less injustice, till at length, after the lapse of a quarter of a century, a remedy was applied to them by the Mercantile Law Amendment Act, 1856.<sup>3</sup> § 13 enacts, with reference to the first defect, that "an acknowledgment or promise made or contained by or in a writing signed by an *agent* of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself."<sup>4</sup> The second defect was cured by § 14 of the same Act, which provides, that "when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co contractor or co-debtor, executor or adminis-

<sup>1</sup> 21 J. 1, c. 16.

<sup>2</sup> § 4 of 9 G. 4, c. 14, enacts, "that the said Act of James, and that Act, shall apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant."

<sup>3</sup> 19 & 20 V., c. 97.

<sup>4</sup> This section applies to § 24 of 16 & 17 V., c. 113, Ir. as well as to § 1 of Ld. Tenterden's Act. As to the law in India, see the Indian Act IX. of 1871, s. 20, and *Dinomoyi Debi v. Roy Luchmissut Singh*, L. R., 7 Ind. App. 8.

trator shall lose the benefit of the" Statutes of Limitations,<sup>1</sup> "so as to be chargeable in respect or by reason only of payment<sup>2</sup> of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators."

§ 746. The enactment last cited came under the consideration of a court of equity in the case of *Thompson v. Waitham*.<sup>3</sup> There, two partners had given a promissory note in the name of the firm. One of the partners afterwards died, leaving his co-partner his executor; and this man continued to pay interest on the note for some years, when he became bankrupt. The holder of the note then claimed payment out of the assets of the deceased partner's estate; but as more than six years had elapsed since the date of the death, the Statute of Limitations was set up as a bar to the claim. Vice-Chancellor Kindersley recognised the validity of this defence, holding that the payments in the case before him must be presumed to have been made by the bankrupt in his character of surviving partner, and not as executor of his deceased partner. In the case, too, of *Jackson v. Woolley*,<sup>4</sup> the Court of Queen's Bench has ruled, that, on the proper construction of the enactment in question, payment by one co-debtor, with the knowledge and mere consent of the other, does not deprive that other of the benefit of the Statute of Limitations.

§ 747. "The Real Property Limitation Act, 1874,"<sup>5</sup> which, although passed in that year, did not come into operation till the 1st of January, 1879,<sup>6</sup> contains, in § 7<sup>7</sup> a provision respecting

<sup>1</sup> 21 J. 1, c. 16, § 3; 3 & 4, W. 4, c. 42, § 3; 16 & 17 V., c. 113, s. 20, Ir.

<sup>2</sup> See *Cockrill v. Sparkes*, 32 L. J., Ex. 118; 1 H. & C. 699, S. C.

<sup>3</sup> 26 L. J., Ch. 134; 3 Drew. 628, S. C.

<sup>4</sup> 27 L. J., Q. B. 181; 8 E. & B. 778, S. C.

<sup>5</sup> 37 & 38 V., c. 57.

<sup>6</sup> § 12.

<sup>7</sup> This enactment,—which has been substituted for § 28 of 3 & 4 W. 4, c. 27, and which reduces the period of *twenty* years therein named to a period of *twelve* years, making no other alteration in the law,—is as follows:—

"When a mortgagee shall have obtained the possession or receipt of the



acknowledgments of the mortgagor's title given by one of several mortgagees in possession, which is the same in principle as the enactments just cited from Lord Tenterden's Act.

§ 748. Where a member of a partnership has been adjudged § 678A bankrupt, and an action has been brought, under the authority of the Court of Bankruptcy, in the joint names of the trustee and of the bankrupt's partner, such partner has no power to release the debt or demand to which the action relates, but any attempted

profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within *twelve* years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and, in such case, no such action or suit shall be brought but within *twelve* years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be *more than one mortgagee*, or more than one person claiming the estate or interest of the mortgagee or mortgagees, *such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid*, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under, him or them, or any person or persons entitled to any estate or estates, interest or interests, to take effect after, or in defeasance of, his or their estate or estates, interest or interests; and *shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage, as against the person or persons entitled to any other undivided or divided part of the money or land or rent*; and where such of the mortgagees or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage." § 28 of 3 & 4, W. 4, c. 27, has been repealed by § 9 of 37 & 38 V., c. 57. See *Richardson v. Younge*, 10 Law Rep., Eq. 275, per Malins, V.-C.; 39 L. J., Ch. 475, S. C.; 40 L. J., Ch. 338, S. C., by Lds. Js.; and 6 Law Rep., Ch. Ap. 478.

release made by him, is, by the Bankruptcy Act of 1883,<sup>1</sup>—as was the law by the Act of 1869,<sup>2</sup>—rendered void.<sup>3</sup>

§ 749. If an admission has been made by one of several parties § 679 in *fraud* of the others jointly interested with him, and in collusion with the opponent, then, on proof of this fact by the innocent parties, such admission will, on principles of equity, be rejected by the court.<sup>4</sup>

§ 750. In order to render the admission of one person receivable § 680 in evidence against another, it must relate to some matter in which either both were *jointly* interested, or one was *derivatively* interested through the other; and a *mere community of interest* will not be sufficient. Thus, where two persons were in partnership, and an action was brought against them as part-owners of a vessel, an admission made by the one, as to a matter which was not a subject of co-partnership, but only of co-part-ownership, was held inadmissible against the other.<sup>5</sup> So, where two executors were sued on a covenant by a testator for quiet enjoyment, and the question somewhat singularly raised by the facts and the pleadings was, whether the defendants, who had themselves evicted the covenantee, had done so under a lawful title, it was held that the plaintiff, in order to establish this fact, could not put in evidence a declaration by one of the defendants, made after entry, to the effect that both of them had a lawful title, through the testator, under a deed prior to that on which the action was founded.<sup>6</sup> The court considered that this admission was not made by the party in his character as executor, nor did it relate to any matter touching the testator's estate; but it simply referred to something of which the two defendants had

<sup>1</sup> 46 & 47 V., c. 52, § 113.

<sup>2</sup> 32 & 33 V., c. 71, § 105.

<sup>3</sup> But in order to protect the interest of the partner, he must have "notice of the application for authority to commence the action," and if he claims no benefit therefrom, "he shall be indemnified against costs."

<sup>4</sup> See *Rawstorne v. Gandell*, 15 M. & W. 304; *Phillips v. Claggett*, 11 M. & W. 84; ante, § 741.

<sup>5</sup> *Jaggers v. Binnings*, 1 Stark. R. 64, per Ld. Ellenborough. See *Brodie v. Howard*, 17 Com. B. 109.

<sup>6</sup> *Fox v. Waters*, 12 A. & E. 43. See *Stanton v. Percival*, 5 H. of L. Cas. 257.

taken advantage in their individual capacities. It may even be doubted whether an express promise made by one executor in his representative character will bind the remaining executors in their representative characters;<sup>1</sup> and it has been held that the admission of the receipt of money by one of several trustees, who were joint defendants, but were not personally liable, could not be received to charge the others.<sup>2</sup>

§ 751.<sup>3</sup> So, where a joint contract is severed by the death of one § 681 of the contractors, nothing that is subsequently done or said by the survivor can bind the personal representative of the deceased,<sup>4</sup> nor can the acts or admissions of the executor bind the survivor.<sup>5</sup> Neither will the admissions of one tenant in common be receivable against his co-tenant, though both are parties on the same side of the suit;<sup>6</sup> and in America, it has been decided, that no such privity exists among the members of a board of public officers,<sup>7</sup> or among several indorsers of a promissory note,<sup>8</sup> or between executors and heirs of devisees,<sup>9</sup> as to make the admission of one binding on all. These cases almost dispense with the necessity of adding, that in an action for negligence, or trespass, or in any other action for tort, the admission of one defendant will not be evidence against the others;<sup>10</sup> and it is abundantly clear that the same rule prevails

<sup>1</sup> *Tullock v. Dunn*, Ry. & M. 416, per Abbott, C. J.; cited with approbation by Parke, B., in *Scholey v. Walton*, 12 M. & W. 514, who there questioned the correctness of the contrary opinion, which the Q. B. appeared to have entertained in *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & R. 200, S. C.; and in *M'Culloch v. Dawes*, 9 D. & R. 40.

<sup>2</sup> *Davies v. Ridge*, 3 Esp. 101, 102, per Ld. Eldon.

<sup>3</sup> Gr. Ev. § 176, in part.

<sup>4</sup> *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & R. 200, S. C.; *Fordham v. Wallis*, 10 Hare, 217; *Slaymaker v. Gundacker's Ex.*, 10 Serg. & R. 75.

<sup>5</sup> *Slater v. Lawson*, 1 B. & Ad. 396; *Hathaway v. Haskell*, 9 Pick. 24.

<sup>6</sup> *Dan v. Brown*, 4 Cowen, 483, 492.

<sup>7</sup> *Lockwood v. Smith*, 5 Day, 309.

<sup>8</sup> *Slaymaker v. Gundacker's Ex.*, 10 Serg. & R. 75.

<sup>9</sup> *Osgood v. Manhattan Co.*, 3 Cowen, 611. See, also, *Fordham v. Wallis*, 10 Hare, 217.

<sup>10</sup> *Daniels v. Potter*, M. & M. 501, per Tindal, C. J.; *Morse v. Royal*, 12 Ves. 362, per Ld. Erskine. See *R. v. Hardwick*, 11 East, 585, where Ld. Ellenborough lays down the rule somewhat too loosely.

in criminal proceedings, as the law cannot recognise any partnership or joint interest in crime.<sup>1</sup>

§ 752. One apparent exception to this last proposition prevails, § 682 where the *inhabitants of townships*, counties, or other territorial divisions of the country, sue or are prosecuted *eo nomine*; but in these cases they are regarded in the light of a corporation, of which each individual inhabitant forms a component part; and therefore it is entirely consistent with the rule stated above, to hold that the declarations and admissions of any one of such persons should be receivable in evidence against the collective body. It has, consequently, been decided on an indictment against a township for non-repair of a bridge, that the declarations of all rateable inhabitants, whether actually rated or not, may be given in evidence for the Crown, though the value of such evidence will of course vary according to the knowledge and position of the declarant, and will in many cases be exceedingly slight.<sup>2</sup> So, also, in settlement cases, declarations by rated parishioners will be evidence against the parish.<sup>3</sup> This rule of evidence is in no way affected by the statutes, which render parties to the record and other interested persons competent witnesses.<sup>4</sup>

§ 753.<sup>5</sup> An *apparent joint interest* is obviously insufficient to § 683 make the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy*. A foundation must first be laid, by showing, *prima facie*, that a joint interest exists. Where, therefore, an action was brought against a party for money had and received, and the plaintiff, in order to prove the receipt of the money by the defendant, tendered in evidence certain statements, which had been made by a person whom the defendant had taken into partnership subsequently to the transaction in question, the court rejected the evidence of these

<sup>1</sup> *Grant v. Jackson*, Pea. R. 204, per *Ld. Kenyon*.

<sup>2</sup> *R. v. Adderbury East*, 5 Q. B. 187, 189, n. a.; *R. v. Hardwick*, 11 East, 586, per *Ld. Ellenborough*.

<sup>3</sup> *R. v. Hardwick*, 11 East, 579; *R. v. Whitley Lower*, 1 M. & Sel. 636; *R. v. Woburn*, 10 East, 395.

<sup>4</sup> See 6 & 7 V., c. 85; 14 & 15 V., c. 99; 16 & 17 V., c. 83.

<sup>5</sup> *Gr. Ev.* § 177, in part.

statements, on the ground that a joint liability could not be presumed from the mere fact of a subsequent partnership.<sup>1</sup> Again, the existence of a joint interest which is disputed, cannot be established by the admission of one of the parties sought to be charged, but this fact must be established by independent proof. Therefore, in an action against three makers of a promissory note, the joint execution of which was the point in issue, the admission of his signature by one defendant was held insufficient to entitle the plaintiff to recover against him and the others, though theirs had been proved; the point to be established against all being a joint promise by all.<sup>2</sup> And where it is sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others, to prove the partnership; but it is only after the partnership is shown to exist by independent proof satisfactory to the judge, that the admission of one of the parties are received in order to affect the others.<sup>3</sup> As, however, the admissions are evidence against the party making them, he will be bound thereby, either in an action brought against him as surviving partner, or even, if he be sued on the joint promise with his co-partners, provided they have let judgment go by default.<sup>4</sup>

§ 754. In general, the statement of defence made by one defendant cannot be read in evidence either for or against his co-defendant; neither can the answer to interrogatories of one defendant be read in evidence, excepting against himself;<sup>5</sup> the reason being, that, as there is no issue between the defendants, no opportunity can have been afforded for cross-examination;<sup>6</sup> and

<sup>1</sup> *Catt v. Howard*, 3 Stark. R. 3, 5, per Abbott, C. J.

<sup>2</sup> *Gray v. Palmers*, 1 Esp. 135.

<sup>3</sup> *Nicholls v. Dowding*, 1 Stark. R. 81; *Gibbons v. Wilcox*, 2 Stark. R. 43; *Grant v. Jackson*, Pea. R. 204, per Ld. Kenyon; *Van Reimsdyk v. Kane*, 1 Gall. 635; *Harris v. Wilson*, 7 Wend. 57; *Burgess v. Lane*, 3 Greenl. 165; *Dutton v. Woodman*, 9 Cush. 255, 260.

<sup>4</sup> *Sangster v. Mazarredo*, 1 Stark. R. 161, per Ld. Ellenborough; *Ellis v. Watson*, 2 Stark. R. 453, 478, per Abbott, C. J.

<sup>5</sup> See *Meyer v. Montrion*, 9 Beav. 521; *Stephens v. Heathcote*, 2 Drew. & Sm. 138; *Parker v. Morrell*, 2 Phill. 463, per Ld. Cottenham; *Hoare v. Johnstone*, 2 Keen, 553; *Saltmarsh v. Hardy*, 42 L. J., Ch. 422, per Ld. Selborne, C.

<sup>6</sup> *Jones v. Turberville*, 2 Ves. 11; *Morse v. Royal*, 12 Ves. 355, 361, 362.

moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage.<sup>1</sup> But this rule does not apply to cases, where the other defendant claims through the party whose defence is offered in evidence; nor to cases, where they have a joint interest, either as partners or otherwise, in the transaction.<sup>2</sup> Wherever the admission of one party would be good evidence against another party, the defence of the former may, *a fortiori*, be read against the latter.<sup>3</sup>

§ 755. Where parties either sue or are sued in a *representative* character, it may be questionable how far statements made by them *before they were completely clothed with that character*, will be admissible against them, so as to affect the interest of the persons they represent. In one case, Chief Justice Tindal is reported to have received an admission of a person, who was suing as the assignee, now called the trustee, of a bankrupt, though it was made before he became such;<sup>4</sup> but Lord Tenterden has ruled otherwise on precisely the same point;<sup>5</sup> and in weighing the respective merits of these decisions, the reader will probably be of opinion that Lord Tenterden's was correct. It certainly appears to be a somewhat startling proposition, that the assets of a testator, and the consequent rights of legatees, may be affected by some inconsiderate statement, which the executor, before the death of the testator, may have been induced to make;<sup>6</sup> and the more so, as even the sworn admission of a married woman, answering to a bill in Chancery jointly with her husband, has,—except so far as it related to her separate estate,<sup>7</sup>—

<sup>1</sup> *Wych v. Meal*, 3 P. Wms. 311.

<sup>2</sup> *Petherick v. Turner*, cited 1 Taunt. 104; *Pritchard v. Draper*, 1 Russ. & Myl. 191; *Hilliard v. Phaley*, 8 Mod. 180; *Field v. Holland*, 6 Cranch, 8, 24; *Clark's Ex. v. Van Reimsdyk*, 9 Cranch, 153, 156. See *Parker v. Morrell*, 2 Phill. 453; 2 C. & Kir. 599, S. C.; cited ante, § 599.

<sup>3</sup> *Van Reimsdyk v. Kane*, 1 Gall. 630, 635.

<sup>4</sup> *Smith v. Morgan*, 2 M. & Rob. 257.

<sup>5</sup> *Fenwick v. Thornton*, M. & M. 51. See, also, *Metters v. Brown*, 32 L. J., Ex. 140, per Pollock, C. B.; 1 H. & C. 691, S. C.; *Plant v. M'Ewen*, 4 Conn. 544.

<sup>6</sup> See *Leggs v. Edmonds*, 25 L. J., Ch. 125, which confirms the law as stated in the text.

<sup>7</sup> *Callow v. Howle*, 1 De Gex & Sm. 531; *Clive v. Carew*, 1 Johns. & Hem. 199, 207.

been rejected after his death, as against her, it being considered as the answer of the husband alone.<sup>1</sup> Neither can the affidavit of a guardian of an infant defendant be read against the infant in another suit;<sup>2</sup> though it may be used against the guardian himself, if he afterwards be sued in his private capacity, for it is his own admission upon oath.<sup>3</sup> The same doctrine would seem to apply in the case of a committee of a lunatic.<sup>4</sup>

§ 756.<sup>5</sup> The admissions of persons who are not parties to the record, but who are *interested in the subject-matter of the suit*, will next be considered. The law, in regard to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record. Thus, the admissions of the cestui que trust of a bond, so far as his interest and that of the trustee are identical;<sup>6</sup> those of the persons interested in a policy effected in another's name for their benefit;<sup>7</sup> those of the shipowners, in an action by the master for freight;<sup>8</sup> those of the indemnifying creditor, in an action against the sheriff;<sup>9</sup> those of the deputy-sheriff tending to charge himself, in an action against the high sheriff for the misconduct of the deputy;<sup>10</sup> those of rated parishioners, in a settlement appeal, where

<sup>1</sup> Hodgson v. Merest, 9 Price, 563; Elston v. Wood, 2 Myl. & K. 678.

<sup>2</sup> Eccleston v. Speke, alias Petty, 3 Mod. 258; 2 Vent. 72; Carth. 79; Comb. 156, S. C.; Hawkins v. Luscombe, 2 Swanst. 392, cases cited in n. a; Story, Eq. Pl. § 668; Gresl. Ev. 24, 323; Mills v. Dennis, 3 Johns. Ch. 367. See ante, § 742.

<sup>3</sup> Beasley v. Magrath, 2 Sch. & Lef. 34.

<sup>4</sup> Stanton v. Percival, 5 H. of L. Cas. 257; 24 L. J., Ch. 369, per Dom. Proc. S. C.

<sup>5</sup> Gr. Ev. § 180, in part.

<sup>6</sup> Hanson v. Parker, 1 Wils. 257. See, also, Harrison v. Vallance, 1 Bing. 45; 7 Moore, 304, S. C.; May v. Taylor, 6 M. & Gr. 266, per Maule, J.

<sup>7</sup> Bell v. Ansley, 16 East, 143, per Ld. Ellenborough.

<sup>8</sup> Smith v. Lyon, 3 Camp. 465.

<sup>9</sup> Dowden v. Fowle, 4 Camp. 38; Proctor v. Laison, 7 C. & P. 629, per Ld. Abinger; Dyke v. Aldridge, cited 7 T. R. 665; 11 East, 584; Young v. Smith, 6 Esp. 121; Harwood v. Keys, 1 M. & Rob. 204.

<sup>10</sup> Snowball v. Goodricke, 4 B. & Ad. 541, questioning the language of Ld. Kenyon and Lawrence, J., in Drake v. Sykes, 7 T. R. 113, which seems to identify the sheriff with the under-sheriff to all intents. Yabeley v. Noble, 1 Ld. Ray. 190. The declarations of under-sheriffs, or of the sheriff's bailiffs,

the churchwardens and overseers of the poor are the nominal parties on the record;<sup>1</sup> and, in short, those of any persons who are represented in the cause by other parties,—are receivable in evidence against their respective representatives.<sup>2</sup> On this ground, it has been repeatedly held on the trial of election petitions, that the declarations of voters against their own voters, whether made before or after the votes were given,<sup>3</sup> and even though invalidating their votes on the ground of their having received bribes,<sup>4</sup> are admissible in evidence; for, in a scrutiny, each case is considered as a separate cause, in which the supporter of the vote under discussion and the voter are the parties on the one side, and the opposers of the vote are the parties on the other.<sup>5</sup>

§ 757. In all these cases, the declarations or admissions must, as will presently be seen,<sup>6</sup> have been made while the party making them had some interest in the matter; and, moreover, they are receivable in evidence only so far as his own interests, or the interests of those who claim through him, are concerned. In illustration of this last proposition, it may be observed, that if an action be brought by trustees, who represent the interests of a variety of *cestuis que trust*, the statements of the person beneficially interested as tenant for life cannot be received as evidence for the defendant, so as to prejudice the rights of the remaindermen in fee. Indeed, before the declaration of a *cestui que trust*

accompanying official acts, are admissible as parts of the *res gestæ*. See *Jacobs v. Humphrey*, 2 C. & M. 413; 2 Tyr. 272, S. C.; *Scott v. Marshall*, 2 C. & J. 238; *North v. Miles*, 1 Camp. 390, per *Ld. Ellenborough*; and *ante*, § 583, *et seq.*

<sup>1</sup> *R. v. Hardwick*, 11 East, 579; *R. v. Whitley Lower*, 1 M. & Sel. 636.

<sup>2</sup> In *Hart v. Horn*, 2 Camp. 92, which was an action of replevin, the declarations of the person, under whom the defendant made cognizance, were rejected by *Heath, J.*, as evidence for the plaintiff; but it is presumed that this case is not law. See *Welstead v. Levy*, 1 M. & Rob. 138.

<sup>3</sup> *Southampton case*, *Cock. & R.* 113—117; *Per. & K.* 225, S. C.; *Ripon case*, *Cock. & R.* 301; *Per. & K.* 211, S. C.; *Petersfield case*, *Cock. & R.* 34; *Per. & K.* 49, S. C.; *New Windsor*, *Knapp & O.* 173, 174; *Ennis*, *id.* 435; *Droitwich*, *id.* 64; *Bedfordshire*, 2 *Luders*, 411; and other cases cited 2 *Rog. on Elect.* 139.

<sup>4</sup> *Ipswich*, *Knapp & O.* 387—389; and cases cited 2 *Rog. on Elect.* 139.

<sup>5</sup> 2 *Rog. on Elect.* 139.

<sup>6</sup> *Post*, § 794.



will be admitted at all against a trustee, the nature of the interest of the declarant in the trust estate must be shown, so that it may clearly appear that he alone is entitled to the benefit resulting from the action.<sup>1</sup>

§ 758. In applying the rule that a man's admissions are only evidence against himself and his privies, care must be taken to distinguish between the position of a *tenant for life* and that of a *tenant in tail*. A tenant for life cannot—unless empowered by some special statute<sup>2</sup>—prejudice, by an admission, the interest of a remainder-man or reversioner; but a tenant in tail is regarded as representing the inheritance, and, therefore, what he says or does will often be binding on the persons entitled in remainder. Thus, the law is well settled that a release of the equity of redemption by a tenant in tail in possession,<sup>3</sup> or a decree of foreclosure against him, will bind the remainder-man; and the acknowledgment by a tenant in tail of a mortgage title, which, in the absence of such admission, would have been barred by the equitable rule respecting limitations, has been held to restore, as against the remainder-man, the right of redemption.<sup>5</sup>

§ 759.<sup>6</sup> In some cases, the admissions of *third persons, strangers to the suit*, are receivable. These exceptions to the general rule arise when the issue is substantially upon the mutual rights of such persons at a particular time; in which cases the practice is to let in such evidence in general, as would be legally admissible in an action between the parties themselves. Thus, the admissions of a bankrupt, made before the act of bankruptcy, are receivable in proof of the petitioning creditor's debt;<sup>7</sup> but if made after the act of bankruptcy, though admissible against himself,<sup>8</sup> they cannot

<sup>1</sup> Doe v. Wainwright, 8 A. & E. 691, 699, 700; 3 N. & M. 598, S. C.; May v. Taylor, 6 M. & Gr. 261.

<sup>2</sup> See ante, § 692, n.<sup>2</sup>, and post, § 1088, n., at 7th line from end of sect.

<sup>3</sup> Reynoldson v. Perkins, Amb. 563.

<sup>4</sup> Pendleton v. Rooth, 1 Giff. 45, per Stuart, V.-C.

<sup>5</sup> Id. 1 Giff. 35; 1 De Gex, F. & J. 81, S. C.

<sup>6</sup> Gr. Ev. § 181, in part.

<sup>7</sup> See Coole v. Braham, 3 Ex. R. 185.

<sup>8</sup> Jarrett v. Leonard, 2 M. & Sel. 265.

furnish evidence against the trustee, because of the intervening rights of creditors, and the danger of fraud.<sup>1</sup>

§ 760.<sup>2</sup> The admissions of a third person are also receivable in evidence against the party who has *expressly referred another to him* for information in regard to an uncertain or disputed matter. In such cases the party is bound by the declaration of the person referred to, in the same manner, and to the same extent, as if they were made by himself. Thus, upon a plea of plene administravit, where the executors wrote to the plaintiff, that if she wished for further information in regard to the assets, she should apply to a certain merchant in the city, they were held bound by the replies of the merchant to her inquiries upon that subject.<sup>3</sup> So, in an action for goods sold and delivered, where the fact of the delivery of them by the carman was disputed, and the defendant said, "If he will say that he delivered the goods, I will pay for them;" he was held bound by the affirmative reply of the carman.<sup>4</sup>

§ 761. In the application of this principle, it matters not whether the question referred be one of law or of fact; whether the person to whom reference is made, have or have not any peculiar knowledge on the subject; or whether the statements of the reference be adduced in evidence in an action on contract, or in an action for tort. Therefore, where two parties had agreed to abide by the opinion of counsel upon the construction of a statute, the party against whose interest the opinion operated was held bound thereby in a subsequent action;<sup>5</sup> and a disputed fact

<sup>1</sup> Hoare v. Coryton, 4 Taunt. 560; 2 Rose, 158, S. C.; Robson v. Kemp, 4 Esp. 234; Watts v. Thorpe, 1 Camp. 376; Smallcombe v. Bruges, McClell. 45; 13 Price, 136, S. C.; Taylor v. Kinloch, 1 Stark. R. 175; 2 Stark. R. 594, S. C. These cases virtually overrule Downton v. Cross, 1 Esp. 168. See, also, Bernasconi v. Farebrother, 3 B. & A. D. 372.

<sup>2</sup> Gr. Ev. § 182, almost verbatim.

<sup>3</sup> Williams v. Innes, 1 Camp. 364, per Ld. Ellenborough.

<sup>4</sup> Daniel v. Pitt, Pea. Ad. Cas. 238; 1 Camp. 366, n.; 6 Esp. 74, S. C.; Brock v. Kent, 1 Camp. 366, n.; Burt v. Palmer, 5 Esp. 145; Hood v. Reeve, 3 C. & P. 532. R. v. Mallory, L. R., 13 Q. B. D. 33; 53 L. J., M. C. 134; 15 Cox, 456, S. C., where the person referred to by a prisoner was his wife, who thereupon made an admission in his presence, and this admission was held to be good evidence.

<sup>5</sup> Price v. Hollis, 1 M. & Sel. 105.

regarding a mine, having been referred by consent to a miner's jury, their decision was received in evidence when one of the disputants afterwards brought an action on the case against his adversary.<sup>1</sup> In these cases the decisions, which partook of the nature of awards, were not stamped; but the court held that this was immaterial, as the instruments, not containing any recital of the agreements, did not on their face purport to be awards.

§ 762. The doctrine under discussion may further be illustrated § 690 by the case of *Downs v. Cooper*.<sup>2</sup> There the defendant had demised premises to the plaintiff, who entered and paid him rent. During the term a brother of the defendant disputed his title, and to avoid litigation between brothers, both, within the knowledge of the plaintiff, agreed to abide by the opinion of a barrister, to whom a case was submitted. The opinion being adverse to the defendant, he thereupon gave up his title deeds, and permitted his brother's attorney to tell the plaintiff, that in future he must regard the brother as his landlord. The plaintiff paid his rent accordingly; but the defendant being subsequently dissatisfied with the barrister's opinion, levied a distress, and an action of replevin was the consequence. The above facts being stated in the plea in bar, the court held, that, though in general a tenant is estopped from denying his landlord's title, he was not so here, inasmuch as the conduct of the defendant amounted to an admission that his title had expired.

§ 763. To render the declarations of a person referred to equiva- § 691 lent to a party's own admission, it is not necessary that the reference should have been made by express words; but it will suffice if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. Therefore, where a party, on being questioned by means of an interpreter, gave his answers through the same medium, it has been held that the language of the interpreter should be considered as that of the party; and that,

<sup>1</sup> *Sybray v. White*, 1 M. & W. 435; Tyr. Gr. 746, S. C.

<sup>2</sup> 2 Q. B. 256.

consequently, it might be proved by any person who heard it, without calling the interpreter himself.<sup>1</sup> So, if a party, on motion before a judge, uses the affidavit of another person to prove a certain fact deposed to therein, such affidavit is on any subsequent trial evidence as against him of this fact, and that, too, though the person who made the affidavit is present in court;<sup>2</sup> and where a petitioning creditor, knowing that his servant could prove a particular act of bankruptcy, sent him expressly for that purpose to be examined at the opening of the fiat, the depositions so made were held to be evidence of the act of bankruptcy as against the petitioning creditor, where that fact was put in issue in an action brought against him by the assignees.<sup>3</sup>

§ 764. It has even been held,—apparently on the authority of § 688 these cases,—that, where the question in an action of trespass was whether the plaintiff or defendant was the tenant of a field, the deposition of a witness who, in a proceeding before justices for an alleged trespass on the same close, had been called by the plaintiff to prove his possession, but had in fact disproved it, might be put in evidence for the defendant, though the witness was alive.<sup>4</sup> In this case, however, as the witness was abroad at the time of the trial, and as the litigants and the matter in dispute before the justices were identical with those before the court, the depositions would seem to have been admissible, rather as secondary evidence of oral testimony<sup>5</sup> than as admissions by the accredited agent of the plaintiff.<sup>6</sup> In this last light they could scarcely have been viewed, consistently with the opinion of the court, as expressed in *Gardner v. Moulton*,<sup>7</sup> or *Brickell v. Hulse*,<sup>8</sup> for in both these cases the judges expressly admitted, that a party was not bound by what his witness might say at *Nisi Prius*.

<sup>1</sup> *Fabrigas v. Mostyn*, 20 How. St. Tr. 122, 123, per Gould, J.

<sup>2</sup> *Brickell v. Hulse*, 7 A. & E. 454; *Boileau v. Rutlin*, 2 Ex. R. 675, 679, 680; *Pritchard v. Bagshawe*, 11 Com. B. 459; *Johnson v. Ward*, 6 Esp. 47, per Chambre, J. But see *White v. Dowling*, 8 Ir. Law R. 128.

<sup>3</sup> *Gardner v. Moulton*, 10 A. & E. 464; *Boileau v. Rutlin*, 2 Ex. R. 680.

<sup>4</sup> *Cole v. Headly*, 11 A. & E. 807.

<sup>5</sup> Ante, § 464.

<sup>6</sup> See *Boileau v. Rutlin*, 2 Ex. R. 680, per Parke, B.

<sup>7</sup> 10 A. & E. 468, per Ld. Denman & Patteson, J.

<sup>8</sup> 7 A. & E. 456—458, per Ld. Denman & Coleridge, J. See ante, § 468.

§ 765.<sup>1</sup> Whether the answer of a person thus referred to is *conclusive* against the party does not seem to have been settled. § 693  
Where the plaintiff had offered to rest his claim upon the defendant's affidavit, which was accordingly made, Lord Kenyon held that he was conclusively bound, even though the affidavit were false; and he added, that, to make such a proposition and afterwards to recede from it, was not only a dishonest act, but was one which might be turned to very improper purposes, such as to entrap the witness, or to find out how far the party's evidence would go in support of his case.<sup>2</sup> But in a later case, where the question was whether a horse in the defendant's possession was identical with one lost by the plaintiff, and the plaintiff had said that if the defendant would take his oath that the horse was his, he should keep him; and he made oath accordingly; Lord Tenterden observed, that considering the loose manner in which the evidence had been given, he would not receive it as conclusive, though it was a circumstance on which he should not fail to remark to the jury.<sup>3</sup> And certainly the opinion of Lord Tenterden, indicated by what fell from him in this case, more perfectly harmonizes with other parts of the law, especially as it is opposed to any further extension of the doctrine of estoppels, which precludes the investigation of truth. The purposes of justice and policy are sufficiently answered, by throwing the burthen of proof on the opposing party, as in the case of an award, and by holding him bound, unless he can impeach the test referred to by clear proof of fraud or mistake.<sup>4</sup>

§ 766. It may here be expedient to examine briefly how far the *admissions of a married woman* can be received in evidence, either § 694  
against herself or her trustees, or for or against her husband. If a *wife sue or be sued as a single woman*, no valid reason can be given why her admissions should not have the same legal effect

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<sup>1</sup> Gr. Ev. § 184, in great part.

<sup>2</sup> *Stevens v. Thacker*, Pea. R. 187; *Lloyd v. Willan*, 1 Esp. 178; *Bretton v. Prettiman*, T. Ray. 153; *Delesline v. Greenland*, 1 Bay, 458, where the oath of a third person was referred to.

<sup>3</sup> *Garnet v. Ball*, 3 Stark. R. 160.

<sup>4</sup> *Whitehead v. Tattersall*, 1 A. & E. 491.

as those of any other person; but in one case, where the defence to an action on contract was that the plaintiff was under coverture when the cause of action accrued, Lord Ellenborough is reported to have held,—on what grounds it does not appear,—that it was not sufficient to show that she had acknowledged herself to be married, without proof of an actual marriage, or at least of cohabitation.<sup>1</sup> If the *trustees of a married woman sue or be sued*, and the opposite party be a stranger, her admissions, like those of an ordinary *cestui que trust*,<sup>2</sup> will be clearly admissible as against the trustees; and even if the husband be the hostile party, it seems that, on principle, the wife's admissions ought to be received on his behalf to the same extent as her *viva voce* testimony;<sup>3</sup> for the principle of policy which admits the one should equally admit the other; and, therefore, it is probable that if an action were brought against a husband by the trustees of his wife under a separation deed, for arrears of maintenance, and the defence were to rest on the fact of the wife's adultery, proof of her admission of criminal misconduct would,—contrary to what was formerly the law,<sup>4</sup>—be now received.

§ 767. The admissions of a wife cannot be received in evidence § 695 for her husband in any suit between him and a stranger, unless, perhaps, in the single event of their constituting part of the *res gestæ*. An instance of their admissibility on this ground is afforded by the case of *Walton v. Green*,<sup>5</sup> where, in an action of *assumpsit* for goods supplied to a wife, who had been turned out of doors by her husband the defendant, evidence was admitted, in support of a defence which relied on her previous adultery, that she had confessed her guilt to a third party; as it appeared to have been partly in consequence of this confession that she had been put away by her husband. This case is here noticed, more out of respect for the eminent judge who decided it, than because it appears to rest upon any sound principle of law. The question was not whether the husband had reason to suspect his wife's fidelity, but

<sup>1</sup> *Wilson v. Mitchell*, 3 Camp. 393.

<sup>2</sup> See ante, § 756.

<sup>3</sup> See 16 & 17 V., c. 63.

<sup>4</sup> *Scholey v. Goodman*, 1 Bing. 349.

<sup>5</sup> 1 C. & P. 621, per Abbott, C. J.

whether she had in fact committed adultery; and to allow her admissions to establish that fact, and thus to screen her husband from the claims of a stranger, would seem to be directly opposed to the rule of law which rejects hearsay evidence.

§ 768. It remains to be seen in what manner the Divorce § 696  
Division of the High Court<sup>1</sup> will deal with the wife's admissions of adultery, on applications for judicial separation, or for restitution of conjugal rights, and on petitions for dissolution of marriage. The unfettered reception of such evidence in the last class of cases, would open a wide door to collusion: and on this ground, the *House of Lords*, in proceedings upon *bills of divorce*, was generally in the habit of rejecting letters from the wife to the husband containing confessions of adultery,<sup>2</sup> unless they were ordered in confirmation of circumstances which tended strongly to prove the defendant's guilt.<sup>3</sup> It seems, however, that such letters, if addressed to a stranger, or even to the husband's agent, were receivable in evidence, after proof that they were not written in consequence of any threat or promise, and that the writer was then living apart from her husband;<sup>4</sup> and it further seems, that the wife's oral confession of guilt to a third party was admissible, at least as confirmatory evidence.<sup>5</sup> Not only were direct confessions rejected in the House of Lords, except under the circumstances above stated, but all letters written by the wife after her separation, either to the husband or to the adulterer, were generally held inadmissible, unless they were connected with some particular fact,<sup>6</sup> or could be referred to as part of the *res gestæ*,<sup>7</sup> or were tendered in evidence after a *prima facie* case of guilt had been already established. In one case, where the husband held a situation at Malta, and his wife, in consequence of bad health, had left the island, and had resided in England

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<sup>1</sup> The Act of 20 & 21 V., c. 85, and the Rules which regulate the practice of the court, are alike silent on this subject.

<sup>2</sup> *Ld. Cloncurry's case*, Macq. Pr. in H. of L. 606.

<sup>3</sup> *Doyle's case*, id. 654. See id. 536, 537.

<sup>4</sup> *Ld. Cloncurry's case*, Macq. Pr. in H. of L. 606.

<sup>5</sup> *Ld. Ellenborough's case*, id. 655. But see *Wiseman's case*, id. 631.

<sup>6</sup> *Dundas's case*, id. 610.

<sup>7</sup> *Boydell's case*, id. 651.

for several years, during which time she had lived with a paramour and had borne him four children, the House of Lords admitted a series of letters from the wife to her husband, which were tendered as accounting for the circumstance of her not going out to rejoin him, and as showing that she had practised upon him the grossest deceit.<sup>1</sup>

§ 789. In the *Ecclesiastical Courts* a less strict rule obtained than was observed in the Common Law Courts, with respect to the exclusion of a *wife's confession*. By a canon<sup>2</sup> passed in 1603, a mere confession, indeed, unaccompanied by other circumstances, was rendered insufficient to support a prayer for a separation *a mensâ et thoro*; and this rule has been held applicable, though the confession was made under the apprehension of approaching dissolution, and was free from all suspicion of a collusive purpose.<sup>3</sup> Still the confession was always admissible in evidence, and, if coupled with other facts of a suspicious nature, it generally proved an important ingredient in the decision of the court. In one case, letters from the wife to the supposed paramour, taken in conjunction with other suspicious circumstances, were, in the absence of direct proof, considered to establish her guilt, though they contained no express avowal of adultery, and though they never reached the hands of the party to whom they were addressed, as they were intercepted by the husband.<sup>4</sup> Whether the wife's confession of adultery would be sufficient in itself to repel a suit instituted by her for restitution of conjugal rights, was still an undecided point when the Spiritual Courts were deprived by the Legislature of their jurisdiction over such matters;<sup>5</sup> but, in

<sup>1</sup> Miller's case, id. 620—623.

<sup>2</sup> No. 105.

<sup>3</sup> Mortimer v. Mortimer, 2 Hagg. Cons. 318.

<sup>4</sup> Grant v. Grant, 2 Curt. 16; Caton v. Caton, 7 Ec. & Mar. Cas. 15—17; Faussett v. Faussett, id. 88. In the Eccles. Courts, letters from the alleged paramour, found in the wife's possession, were admissible; but if they did not necessarily imply the commission of adultery, or were not supported by other evidence of indecent familiarities, they were insufficient to support a sentence of separation. Hamerton v. Hamerton, 2 Hagg. Ec. R. 8. As to the admissibility of letters written by the adulterer to the wife, in proceedings before the H. of L., see *Ld. Glerawley's case*, Macq. Pr. in H. of L. 629.

<sup>5</sup> Mortimer v. Mortimer, 2 Hagg. Cons. 310; Burgess v. Burgess, id. 227. (3542)



a suit of nullity of marriage, by reason of a former marriage, the simple admission of such former marriage was held not to be sufficient.<sup>1</sup>

§ 770.<sup>2</sup> The *admissions of the wife will bind the husband only* § 698 where she had authority to make them.<sup>3</sup> This authority does not result, by mere operation of law, from the relation of husband and wife; but is a question of fact, to be found by the jury, as in other cases of agency; for, though this relation is peculiar in its circumstances, from its close intimacy and its very nature, yet there is nothing peculiar in the principles of law which apply to it. As the wife is seldom expressly constituted the agent of the husband, the cases on this subject are almost universally those of implied authority, turning upon the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question.<sup>4</sup> Where, under the old law,<sup>5</sup> he sued for her wages, the mere fact that she had earned them did not authorise her to bind him by her admissions of payment;<sup>6</sup> nor could her unauthorised declarations affect him, even where he sued with her in her right; for in these, and similar cases, the right was his own, though acquired through her instrumentality.<sup>7</sup>

§ 771. In regard to the inference of her agency from circum- § 699 stances, the question used to be left to the jury with great latitude, both as to the fact of agency, and the time of the admissions. Thus, it has been held competent for them to infer authority in her

<sup>1</sup> Searle v. Price, 2 Hagg. Cons. 189.

<sup>2</sup> Gr. Ev. § 185, in great part.

<sup>3</sup> Emerson v. Blonden, 1 Esp. 142; Anderson v. Sanderson, 2 Stark. R. 204; Carey v. Adkins, 4 Camp. 92; Meredith v. Footner, 11 M. & W. 202.

<sup>4</sup> See ante, § 192.

<sup>5</sup> A married woman may now sue for wages in her own name, 45 & 46 V., c. 75, §§ 1, 2.

<sup>6</sup> Hall v. Hill, 2 Str. 1094.

<sup>7</sup> Alban v. Pritchett, 6 T. R. 680; Kelly v. Small, 2 Esp. 716; Denn v. White, 7 T. R. 112, as to the wife's admission of a trespass. Neither are the husband's admissions as to facts respecting his wife's property, which happened before the marriage, receivable after his death to affect the rights of the surviving wife. Smith v. Scudder, 11 Serg. & R. 325.

to accept a notice and direction, in regard to a particular transaction in her husband's trade, from the circumstances of her being seen twice in his counting-house appearing to conduct his business relating to that transaction, and once giving orders to the foreman.<sup>1</sup> And in an action against the husband for goods furnished to the wife while in the country, where he occasionally visited her, her letter to the plaintiff, admitting the debt, and apologising for the non-payment, though written several years after the transaction, was held by Lord Ellenborough, previous to Lord Tenterden's Act,<sup>2</sup> sufficient to take the case out of the Statute of Limitations.<sup>3</sup> Of late years, however, a greater strictness has prevailed; and in the case of *Meredith v. Footner*,<sup>4</sup> where a wife, by her husband's authority, carried on the business of a shop, and attended to all the receipts and payments, the court held that admissions made by her to the landlord of the shop respecting the amount of rent were not admissible to bind the husband. Had the admissions related to the receipt of shop goods, they would have been evidence; but the fact that she was conducting a business for her husband, did not constitute her his agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for the future occupation of it.

§ 772.<sup>5</sup> The admissions of *solicitors* bind their clients in all matters relating to the progress and trial of the action. In some cases they are conclusive, and may even be given in evidence upon a new trial; though, previously to such trial, the party give notice that he intends to withdraw them, or though the pleadings be altered, provided the alterations do not relate to the admissions.<sup>6</sup>

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<sup>1</sup> *Plimmer v. Sells*, 3 N. & M. 422.

<sup>2</sup> 9 G. 4, c. 14, § 1, which rendered it necessary that an acknowledgment, to take the case out of the statute, should be in writing, "signed by the party chargeable thereby." The acknowledgment may now be signed by an authorised agent, 19 & 20 V., c. 97, § 13, cited ante, § 745. See post, § 1073.

<sup>3</sup> *Gregory v. Parker*, 1 Camp. 394; *Paethorpe v. Furnish*, 2 Esp. 511, n.; *Clifford v. Burton*, 1 Bing. 199; 8 Moore, 16, S. C.; *Petty v. Anderson*, 3 Bing. 170; *Cotes v. Davis*, 1 Camp. 485.

<sup>4</sup> 11 M. & W. 202.

<sup>5</sup> Gr. Ev. § 186, in part.

<sup>6</sup> *Elton v. Larkins*, 1 M. & Rob. 196, per Tindal, C. J.; 5 C. & P. 385, S. C.; (3544)

But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of relaxing the stringency of some rule of practice, or of dispensing with the formal proof of some document or fact at the trial.<sup>1</sup>

§ 773. Another class of admissions comprehends those which § 701 solicitors make, not indeed with the express intent of dispensing with proof of certain facts, but as it were *incidentally*, while they are referring to other matters connected with the action. These, which are generally the result of carelessness, though not regarded as conclusive admissions, are still considered, not unfrequently, as raising an inference respecting the existence of facts, which the adversary would otherwise have been called upon to prove; and, consequently it, is very important that solicitors should exercise great caution in the language they employ while corresponding with their opponents. Thus, where in an action against the acceptor of a bill, his solicitor had served notice on the plaintiff to produce all papers relating to a bill, the description of which corresponded with that set forth in the declaration,—“which said bill,” the notice went on to state, “*was accepted by the said defendant*,”—the court held that such notice was *prima facie* evidence of the defendant's acceptance;<sup>2</sup> and in an action against the owners of a ship, their joint ownership was inferred from an undertaking to appear for them, signed by their solicitor, in which they were described as owners of the sloop in question.<sup>3</sup> Again, where the defendant's solicitor, in an action of debt on a bond, had admitted the signature of the attesting witness; this was held, by implication, to amount to an admission of the due execution of the instrument.<sup>4</sup>

§ 774.<sup>5</sup> Admissions, however, contained in the *mere conversation* § 702 of a solicitor, cannot be received against a client, though they relate

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Doe v. Bird, 7 C. & P. 6, per Ld. Denman; Langley v. Ld. Oxford, 1 M. & W. 508. See Hargrave v. Hargrave, 12 Beav. 408, as to the case where the client is an infant.

<sup>1</sup> See cases cited in last note. Also, ante, § 724A, et seq.; and Young v. Wright, 1 Camp. 141; Doe v. Rollings, 4 Com. B. 188.

<sup>2</sup> Holt v. Squire, Ry. & M. 282. per Abbott, C. J.

<sup>3</sup> Marshall v. Cliff, 4 Camp. 133, per Ld. Ellenborough.

<sup>4</sup> Milward v. Temple, 1 Camp. 375, per Ld. Ellenborough.

<sup>5</sup> Gr. Ev. § 186, in part.

to the facts in controversy. The reason of this distinction is found in the nature and extent of the authority given, the solicitor being constituted, for the management of the action in court, and for nothing more.<sup>1</sup> So, if a letter sent by a solicitor to the opposite party, be expressed to be written "*without prejudice*," it cannot be received as an admission; neither can the reply be admitted, though not guarded in a similar manner.<sup>2</sup> If the admission were made before suit, it will be equally binding, provided it be shown that the solicitor was already retained to appear in the action.<sup>3</sup> But in the absence of any evidence of such retainer, some other proof must be given of authority to make the admission.<sup>4</sup> When the solicitor is already constituted in the cause, admissions made by his managing clerk, or his agent, are received as his own.<sup>5</sup>

§ 783. Admissions made by *counsel* stand on much the same footing as those made by solicitors; and therefore, where a special case had been signed by the junior barrister on each side, but as a material fact had been omitted, a new trial was granted, the case was regarded by the court as containing the admissions of the parties to the facts therein stated, and its production was held to dispense with a second proof of those facts.<sup>6</sup> Indeed, it may be laid down as a general proposition of law, available alike in the Chancery and Common Law Divisions of the High Court, that a consent once given, or an admission made, by a counsel under his signature, with the authority of his client, with a full knowledge

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<sup>1</sup> Petch v. Lyon, 9 Q. B. 147; Young v. Wright, 1 Camp. 139, 141; Parkins v. Hawkshaw, 2 Stark. R. 239; Doe v. Richards, 2 C. & Kir. 216. See Wilson v. Turner, 1 Taunt. 398; Watson v. King, 3 Com. B. 608.

<sup>2</sup> Paddock v. Forrester, 3 Scott, N. R. 734; 3 M. & Gr. 903, S. C.; Hoghton v. Hoghton, 15 Beav. 321. See Jardine v. Sheridan, 2 C. & Kir. 24; Williams v. Thomas, 2 Drew. & Sm. 29, 37; and post, § 795.

<sup>3</sup> Marshall v. Cliff, 4 Camp. 133, per Ld. Ellenborough; Gainsford v. Grammar, 2 Camp. 9, per id.

<sup>4</sup> Wagstaff v. Wilson, 4 B. & Ad. 339; Burghart v. Angerstein, 6 C. & P. 695, per Alderson, B.; Pope v. Andrews, 9 C. & P. 564, per Coleridge, J.

<sup>5</sup> Taylor v. Willans, 2 B. & Ad. 845, 856; Standage v. Creighton, 5 C. & P. 406; Griffiths v. Williams, 1 T. R. 710; Truslove v. Burton, 9 Moore, 64; Taylor v. Forster, 2 C. & P. 195.

<sup>6</sup> Van Wart v. Wolley, Ry. & M. 4, per Abbott, C. J.; Edmunds v. Newman, id. 5, n. per id.

of the facts, and without some egregious mistake, is conclusively binding, and cannot afterwards be withdrawn.<sup>1</sup> Again, where counsel on both sides so conduct a cause, as to lead to an inference that a certain fact is admitted between them, the court or the jury may treat it as proved;<sup>2</sup> and though the counsel do so with respect to some fact which goes to support one issue only, that fact, it seems, may be taken for granted for all purposes, and as to the whole case.<sup>3</sup> So, where a plaintiff's counsel in his opening stated that his client had paid a particular cheque, but called no evidence in support of that fact, the defendant was allowed to give secondary evidence of the contents of the cheque after notice to produce, without giving further proof of the plaintiff's possession.<sup>4</sup>

§ 784. In the case of *Colledge v. Horn*,<sup>5</sup> this doctrine was sought to be carried one step further; and on a second trial the defendant endeavoured to avoid part of his opponent's demand, by proving an admission, which, on the former trial, had been made in the plaintiff's presence by the plaintiff's counsel in his opening address to the jury. The judge rejected this evidence; and although the court above subsequently granted a new trial, they did so, not on the ground that the ruling was wrong, but because the facts were not sufficiently before them. Mr. Justice Burrough, indeed, felt no difficulty in saying, that, if the plaintiff was in court, and heard what his counsel said, and made no objection, he was bound by the statement; but the other learned judges, with more prudence, forebore giving any opinion on a question, which they held to be one of great nicety. It was urged, with much *truth* at least, in support of the judge's ruling, that statements made by counsel in the course of his address to the jury are often no other than embel-

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<sup>1</sup> *Harvey v. Croydon Union, &c.*, per Ct. of App. 13 Feb., 1884, overruling S. C., as decided by Pearson, J.; 53 L. J., Ch. 335. L. R., 28 Ch. D. 249; 53 L. J., Ch. 707, S. C.

<sup>2</sup> *Stracy v. Blake*, 1 M. & W. 168; *Doe d. Child v. Roe*, 1 E. & B. 279.

<sup>3</sup> *Bolton v. Sherman*, 2 M. & W. 403, per Ld. Abinger.

<sup>4</sup> *Duncombe v. Daniell*, 8 C. & P. 222, 227, per Ld. Denman. But see *Macell v. Ellis*, 1 C. & Kir. 682.

<sup>5</sup> 3 Bing. 119; 10 Moore, 431, S. C. See *R. v. Coyle*, 7 Cox, 74; *Haller v. Worman*, 2 Fost. & Fin. 165, per Keating, J. Sed qu. as to this last case.

lishments of the imagination; and it was contended, that, as bills in equity were not evidence against the parties who filed them, inasmuch as they were supposed to be the suggestions of counsel, so the speeches of barristers should clearly be rejected. Should these arguments be considered inconclusive, *some* learned members of the profession,—if duly watched,—will often save their adversaries much trouble in the way of proof.<sup>1</sup>

§ 785.<sup>2</sup> The admissions of a *principal* can seldom be received as evidence in an action *against the surety* upon his collateral undertaking. In these cases the main inquiry is, whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*. If so, they are admissible; otherwise, they are not. The surety is considered as bound only for the actual conduct of the party, and not for whatever he might say he had done; and therefore he is entitled to proof of the principal's conduct by original evidence, where it can be had; excluding all his declarations made subsequent to the act to which they relate, and out of the course of his official duty.<sup>3</sup> Thus, where one guaranteed the payment for such goods as the plaintiffs should send to another in the way of trade; the admissions of the principal debtor, that he had received goods, made after the time of their supposed delivery, were held

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<sup>1</sup> As to the authority of counsel to bind a client by a compromise or agreement made at the trial, see *Swinfen v. Swinfen*, 25 L. J., C. P. 303; 26 *id.* 97; 1 Com. B., N. S. 364, S. C.; 27 L. J., Ch. 35, *coram Romilly, M. R.*, S. C.; 24 Beav. 549, S. C.; *judg. of M. R. affd. by Lds. Js.*, 2 De Gex & J. 38; 27 L. J., Ch. 491, S. C.; *Chambers v. Mason*, 5 Com. B., N. S. 59; *Swinfen v. Ld. Chelmsford*, 5 H. & N. 890; *Pristwick v. Poley*, 34 L. J., C. P. 189; S. C. *nom. Prestwich v. Poley*, 18 Com. B., N. S. 806; *Strauss v. Francis*, 35 L. J., Q. B. 133; 1 Law Rep., Q. B. 379; and 7 B. & S. 365, S. C.; *Brady v. Curran*, 1 R., 2 C. L. 314; *Holt v. Jesse*, L. R., 3 Ch. D. 177; 46 L. J., Ch. 254, S. C.; *Davis v. Davis*, L. R., 13 Ch. D. 861, *per Fry, J.*; 49 L. J., Ch. 241, S. C.

<sup>2</sup> Gr. Ev. § 187, in great part.

<sup>3</sup> So, in the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him if he be sued by the creditor. *Ex. p. Young, re Kitchin*, L. R., 17 Ch. D. 668.

inadmissible in evidence against the surety.<sup>1</sup> So, if a man become surety in a bond, conditioned for the faithful conduct of a clerk or collector, confessions of embezzlement, made by the principal after his dismissal, cannot be given in evidence if the surety be sued on the bond;<sup>2</sup> though entries made by the principal in the course of his duty, or whereby he has charged himself with the receipt of money, will, at least after his death, be received as proof against the surety.<sup>3</sup>

§ 786.<sup>4</sup> The declarations of a principal may possibly be evidence § 711 against the surety, in a case where the latter, being sued for the default of the former, gives him *notice of the pendency* of the suit and requests him to defend it; for here, if judgment goes against the surety, the record is conclusive evidence for him, in a subsequent action against the principal for indemnity, inasmuch as the principal has thus *virtually become* a party to the suit. This view of the law is at least in accordance with the ruling of Lord Kenyon, which cannot be supported on any other ground. A sheriff had brought an action against the surety of his bailiff, who had kept back some money which he had received; and his lordship held, that a written admission by the bailiff of the receipt of this money was evidence against the surety, as the bailiff was substantially the defendant in the action.<sup>5</sup>

§ 787.<sup>6</sup> The admissions of one person are also evidence against § 712 another, in respect of privity between them. The term *privity* denotes mutual or successive relationship to the same rights of pro-

<sup>1</sup> *Evans v. Beattie*, 5 Esp. 26, per Ld. Ellenborough; *Bacon v. Chesney*, 1 Stark. R. 192, per id.; *Longenecker v. Hyde*, 6 Binn. 1.

<sup>2</sup> *Smith v. Whittingham*, 6 C. & P. 78. See, also, *Cutler v. Newlin*, Mann. Dig. N. P. 137, per Holroyd, J.; *Dunn v. Slee*, Holt, N. P. R. 401; *Dawes v. Shed*, 15 Mass. 6, 9; *Foxcroft v. Nevens*, 4 Greenl. 72; *Hayes v. Seaver*, 7 Greenl. 237; *Beall v. Back*, 3 Har. & McHen. 242.

<sup>3</sup> *Whitnash v. George*, 8 B. & C. 556; *Middleton v. Melton*, 10 B. & C. 317; *Goss v. Watlington*, 3 B. & B. 132; 6 Moore, 355, S. C.; *M'Gahey v. Alston*, 2 M. & W. 213, 214.

<sup>4</sup> Gr. Ev. § 188, in part.

<sup>5</sup> *Perchard v. Tindall*, 1 Esp. 394.

<sup>6</sup> Gr. Ev. § 189, in great part.

party; and privies are distributed in several classes, according to the manner of this relationship. Thus, there are privies in estate,—as, donor and donee, lessor and lessee, joint-tenants, and successive bishops, rectors, and vicars: privies in blood,—as, heir and ancestor, and coparceners; privies in representation,—as, executors and testators, administrators and intestates; privies in law,—where the law, without privity of blood or estate, takes the land from one and bestows it upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law.<sup>1</sup> The ground, upon which admissions bind those in privity with the party making them, is, that they are identified in interest; and of course the rule extends no further than this identity. The cases of coparceners, and of joint tenants, are assimilated to those of joint promissors, partners, and others having a joint interest, which have already been considered.<sup>2</sup> In other cases, where the party by his admissions has qualified his own right, and another claims to succeed him, as heir, executor, or the like, the latter succeeds only to the right as thus qualified at the time when his title commenced; and the admissions are receivable in evidence against the representative, in the same manner as they would have been against the party represented.<sup>3</sup> Thus, the declarations of the ancestor, that he held the land as the tenant of a third person, are admissible to show the seisin of that person, in an action brought by him against the heir for the land.<sup>4</sup> And the declarations of an intestate are admissible against his administrator, or any other claiming in his right;<sup>5</sup> but it has been held, that the declarations of an executor, though made while he was acting in that capacity, are not admissible against a special administrator, who has been appointed in consequence of the executor's protracted absence from England.<sup>6</sup>

<sup>1</sup> Co. Lit. 271 a; *Carver v. Jackson*, 4 Pet. 1, 83; Wood, Inst. LL. Eng. 236; Tomlin, L. Dict. Verb. *Privies*. See *Walker's case*, 3 Co. 23; *Beverley's case*, 4 Co. 123, 124; ante, § 90.

<sup>2</sup> Ante, § 743.

<sup>3</sup> *Coole v. Braham*, 3 Ex. R. 185, per Parke, B.

<sup>4</sup> *Doe v. Pettett*, 5 B. & A. 223; 2 Poth., Obl., 254; ante, §§ 684—687, and cases there cited.

<sup>5</sup> *Smith v. Smith*, 3 Bing. N. C. 29; 7 C. & P. 401, S. C.

<sup>6</sup> *Rush v. Peacock*, 2 M. & Rob. 162, per Ld. Denman. There the adminis-  
(3550)



§ 788.<sup>1</sup> Again, any declaration by a landlord, in a prior lease, which is relative to the matter in issue, and concerns the estate, has been received in evidence against a lessee, who claims by a subsequent title;<sup>2</sup> and admissions,—whether evidenced by letters, receipts, cases drawn for the opinion of counsel, answers in Chancery, or verbal statements,—if made by former bishops, rectors, or vicars, with regard to their several rights, will be evidence against their respective successors, in all cases where the same rights are in question.<sup>3</sup> So, where a vicar had filed a bill against his rector and certain landowners of the parish for tithe hay, and had subsequently abandoned the suit, the defendants in their answer having declared that the tithes in question belonged to the rector, it was held, in an action for similar tithes brought by a succeeding rector against owners, who had purchased their lands from the parties to the former suit, that the answer was strong evidence in favour of the plaintiff.<sup>4</sup> So, ancient maps, books of survey, and the like, though mere private documents, are frequently admissible on this ground, where a privity in estate exists between the former proprietor under whose direction they were made, and the present claimant against whom they are offered.<sup>5</sup> The declarations, also, of former owners or occupiers, made while in possession, have been admitted as evidence of the nature and extent of their title, against those claiming in privity of estate.<sup>6</sup>

§ 789. The question how far the admissions of tenants may be

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trator was appointed under the Act of 38 G. 3, c. 87. As to how far payments made by an executor de son tort to a creditor of a deceased person are binding on the rightful executor, See *Thomson v. Harding*, 2 E. & B. 630.

<sup>1</sup> Gr. Ev. § 189, in part.

<sup>2</sup> *Crease v. Barrett*, 1 C. M. & R. 932. See *Doe v. Seaton*, 2 A. & E. 171.

<sup>3</sup> *Bp. of Meath v. M. of Winchester*, 3 Bing. N. C. 183; *Maddison v. Nuttall*, 6 Bing. 226; 3 M. & P. 544, S. C.; *Doe v. Cole*, 6 C. & P. 359, per *Patteson, J.*; *De Whelpdale v. Milburn*, 5 Price, 485; *Carr v. Mostyn*, 5 Ex. R. 69.

<sup>4</sup> *Lady Dartmouth v. Roberts*, 16 East, 334.

<sup>5</sup> *Bridgman v. Jennings*, 1 Ld. Ray. 734; B. N. P. 283, a.

<sup>6</sup> *Woolway v. Rowe*, 1 A. & E. 114; 3 N. & M. 849, S. C.; *Doe v. Austin*, 9 Bing. 41; *Davies v. Pierce*, 2 T. R. 53; *Doe v. Jones*, 1 Camp. 367; *Jackson v. Bard*, 4 Johns. 230, 234; *Norton v. Pettibone*, 7 Conn. 319; *Weidman v. Kohr*, 4 Serg. & R. 174.

received in evidence against their landlords is not very distinctly ascertained; but, although in one case at *Nisi Prius* it has been held, that the receipts of a lessee of vicarial tithes were evidence, in proof of a modus, against the vicar, by a reason of privity between them;<sup>1</sup> and though in an action for the recovery of land, the admission of the tenant in possession will, from the peculiar nature of the proceedings, be evidence against one who defends as landlord;<sup>2</sup> yet it seems that, in general, the naked declarations of a tenant will not be evidence against the reversioner;<sup>3</sup> and it has been expressly held, that the declarations of a former occupier of the defendant's land were not admissible against him, on an issue whether the plaintiff had an easement in such land.<sup>4</sup>

§ 790.<sup>5</sup> The same principle holds in regard to *admissions made by* § 715 *the assignor* of a personal contract or chattel previous to the assignment, where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer. In such case, he is bound by the previous admissions of the assignor in disparagement of his own apparent title. But this is true only where an identity of interest exists between the assignor and assignee; and such identity is deemed to exist, not only where the latter is either expressly or impliedly the mere agent and representative of the former,<sup>6</sup> but also where the assignee has acquired a title with actual notice of the true state of that of the assignor as qualified by the admissions in question, or where he has purchased a demand already stale, or otherwise infected with circumstances of suspicion.

<sup>1</sup> *Jones v. Carrington*, 1 C. & P. 329, 330, per Park, J. See, also, *Illingworth v. Leigh*, 3 Gwill. 1615; 3 Eag. & Y. 1385, S. C.

<sup>2</sup> *Doe v. Litherland*, 4 A. & E. 784; 6 N. & M. 313, S. C. See Rules of Sup. Ct., 1883, Ord. XII., RR. 25, 26.

<sup>3</sup> *Tickle v. Brown*, 4 A. & E. 378, per Patteson, J.

<sup>4</sup> *Scholes v. Chadwick*, 2 M. & Rob. 507, per Cresswell, J.; *Papendick v. Bridgwater*, 5 E. & B. 166.

<sup>5</sup> Gr. Ev. § 190, almost verbatim.

<sup>6</sup> *Welstead v. Levy*, 1 M. & Rob. 138; *Harrison v. Vallance*, 1 Bing. 45; *Gibblehouse v. Strong*, 3 Rawle, 437; *Hatch v. Dennis*, 1 Fairf. 244; *Snelgrove v. Martin*, 2 M'C. 241, 243.

§ 791.<sup>1</sup> Thus, in an action by the indorsee of a bill or note, which has been taken by the plaintiff after it was due, or without consideration, and with notice of fraud in its original concoction, the declarations of the indorser, made while the interest was in him, are admissible in evidence for the defendant.<sup>2</sup> But, on the other hand, the declarations of a former holder of a note, showing that it was given without consideration, though made while he held the note, are not admissible against the indorsee, to whom the instrument has been transferred on good consideration, and before it was overdue; for such an indorsee derives his title from the nature of the instrument itself, and not through the previous holder; and, as Mr. Justice Parke properly observed, "the right of a person, holding by a good title, is not to be cut down by the acknowledgment of a former holder, that he had no title."<sup>3</sup> In applying this rule, a note payable on demand, though not negotiated for some time after its date, will not on that account be treated as a note taken by an indorsee when overdue; for such notes are intended to be continuing securities, and may circulate for years without exciting suspicion.<sup>4</sup> Neither will the circumstance that the declarations of the prior holder would, if received, prove his fraud in connexion with the indorsee, render them admissible against the latter; because all preliminary facts, which are necessary to establish the admissibility of evidence, must be proved aliundé, before such evidence is received.<sup>5</sup> § 716

§ 792. The case of *Ivat v. Finch*<sup>6</sup> appears to have been decided partly on the same principle. This was an action of trespass for taking three mares, the property of the plaintiff. The defendant, § 717

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<sup>1</sup> Gr. Ev. § 190, in part.

<sup>2</sup> *Beauchamp v. Parry*, 1 B. & Ad. 89; *Peckham v. Potter*, 1 C. & P. 232, per Ld. Gifford; *Benson v. Marshal*, cited in *Shaw v. Broom*, 4 D. & R. 731; *Shirley v. Todd*, 9 Greenl. 83.

<sup>3</sup> *Woolway v. Rowe*, 1 A. & E. 116, explaining *Barough v. White*, 4 B. & C. 325; 6 D. & R. 379, S. C.; *Smith v. De Wruitz*, Ry. & M. 212, per Abbott, C. J.; *Beauchamp v. Parry*, 1 B. & Ad. 89.

<sup>4</sup> *Barough v. White*, 4 B. & C. 325; *Brooks v. Mitchell*, 9 M. & W. 15.

<sup>5</sup> *Phillips v. Cole*, 10 A. & E. 106, 112; 2 P. & D. 288, S. C. See *Heenan v. Clements*, 1 Ir. Law Rep., N. S. 44.

<sup>6</sup> 1 Taunt. 141.

who was lord of the manor, justified under a heriot custom; and the sole question between the parties was, whether one Alice Watson, the tenant, was possessed of the mares at the time of her death. The plaintiff contended that she had given them to him some time before, and tendered in evidence her declarations to that effect. These were rejected at the trial, but the court above held that they were admissible, as they were against her interest, and the right of the lord depended upon her title. But where the fact of this dependence is not directly raised by the issue, such declarations will be inadmissible; and therefore, in *Stotherd v. James*,<sup>1</sup> where an issue was directed to try whether goods seized in A.'s house at the suit of the defendant were the property of the plaintiff, the declarations of A. respecting the property were rejected as evidence; because on that narrow issue the defendant would succeed, whether the goods belonged to A. or to any other person besides the plaintiff. Had the issue raised the question, whether the goods belonged to A. at the time of the execution, it would seem, on principle, that his declarations made before the seizure would have been evidence against the defendant; though, on an issue similar to that which was raised in *Stotherd v. James*, Mr. Justice Wightman is reported to have rejected the debtor's admissions, on the dubious ground that the execution creditor claimed *adversely* to him.<sup>2</sup> In the case of *Coole v. Braham*,<sup>3</sup> the Barons of the Exchequer, while they doubted the doctrine propounded by Mr. Justice Wightman, and intimated an opinion that, in an interpleader suit, the execution creditor should be considered as claiming under the debtor, held that the admissions of the debtor would only be evidence against the execution creditor, when they *qualified* or *affected* the debtor's title to the chattels in question; and, therefore, on an interpleader issue between the holder of a bill of sale and the execution creditor, where the question raised was the usual one of fraud in the concoction of the bill of sale, the court determined that the plaintiff could not support the genuineness of the instrument, by giving evidence of an admission by the debtor of a debt due from him to the

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<sup>1</sup> 1 C. & Kir. 121, per Maule, J.

<sup>2</sup> *Prosser v. Gwillim*, 1 C. & Kir. 95.

<sup>3</sup> 18 L. J., Ex. 105; 3 Ex. R. 183, S. C.

plaintiff, though such admission was made prior to the assignment, it having also been made in the absence of the defendant.

§ 793.<sup>1</sup> These admissions by third persons, as they derive their legal force from the relation of the party making them to the property in question, may be *proved by any witness* who heard them, without calling the party by whom they were made. The question is, whether he made the admission, and not merely whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive,—and it seldom is so,—may be controverted by other testimony, and even by calling the party himself; but it is not necessary to produce him, for his declarations, when admissible at all, will be received as original evidence, and not as hearsay.<sup>2</sup> § 718

§ 794. With respect to *the time and circumstances* of the admission it may first be observed, that whenever the declarations of a third person are offered in evidence, on the ground that the party against whom they are tendered derives his title from the declarant, it must be shown that they were made at a time, when he had an interest in the property in question; because it is manifestly unjust, that a person who has parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make.<sup>3</sup> Thus, the admission of a former party to a bill of exchange, made after he has negotiated it, cannot under any circumstances be received against the holder;<sup>4</sup> and where a person had, by a voluntary postnuptial settlement, conveyed away his interest in an estate, and afterwards had executed a mortgage of the same property, it was held, that his admission that money had actually been § 719

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<sup>1</sup> Gr. Ev. 191, almost verbatim.

<sup>2</sup> Ante, §§ 576, 602, 603, and cases there cited; *Woolway v. Rowe*, 1 A. & E. 114; 3 N. & M. 849, S. C.; *Brickell v. Hulse*, 7 A. & E. 454.

<sup>3</sup> *Doe v. Webber*, 1 A. & E. 740, per Ld. Denman; *Foster v. M'Mahon*, 11 Ir. Eq. R. 301; *Lalor v. Lalor*, 4 L. R. Ir. 678.

<sup>4</sup> *Pocock v. Billing*, 2 Bing. 269; *Shaw v. Broom*, 4 D. & R. 730. See *Roberts v. Justice*, 1 C. & Kir. 93.

advanced upon the mortgage could not be received on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void.<sup>1</sup> So,<sup>2</sup> also, the declaration of a bankrupt, though good evidence to charge his estate with a debt, if made before his bankruptcy, is not admissible at all, if it were made afterwards.<sup>3</sup> This most just and equitable doctrine will be found to apply to the cases of vendor and vendee, grantor and grantee, and, generally, to all cases of rights acquired in good faith previous to the time of making the admission in question.<sup>4</sup>

§ 795. It will here be convenient to repeat,—what has before been § 720 briefly noticed,<sup>5</sup>—that *confidential overtures of pacification*, and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*, are excluded on grounds of public policy.<sup>6</sup> For without this protective rule, it would often be difficult to take any steps toward an amicable compromise or adjustment, and as Lord Mansfield has observed, all men must be permitted to buy their peace, without prejudice to them should the offer not succeed; such offers being made to stop litigation, without regard to the question whether anything is due or not. If, therefore, the defendant, on being sued for 100*l.*, should offer the plaintiff 20*l.*, and at the same time state that such offer was made “without prejudice,” this is not admissible in evidence, for it is irrelevant to the issue; it neither admits nor ascer-

<sup>1</sup> Doe v. Webber, 1 A. & E. 733; 3 N. & M. 586, S. C.; Gully v. Bp. of Exeter, 5 Bing. 171.

<sup>2</sup> Gr. Ev. § 180, in part.

<sup>3</sup> Bateman v. Bailey, 5 T. R. 513; Smith v. Simmes, 1 Esp. 330; Deady v. Harrison, 1 Stark. R. 60. See, also, Harwood v. Keys, 1 M. & Rob. 204, and Kempland v. Macauley, Pea. R. 66, per Ld. Kenyon.

<sup>4</sup> Welstead v. Levy, 1 M. & Rob. 138; Bartlett v. Delprat, 4 Mass. 702, 708; Clark v. Waite, 12 Mass. 439; Bridge v. Eggleston, 14 Mass. 245, 250, 251; Phenix v. Ingraham, 5 Johns. 412; Placker v. Gonsalus, 1 Serg. & R. 526; Patton v. Goldsborough, 9 Serg. & R. 47; Babb v. Clemson, 12 Serg. & R. 328; Crowder v. Hopkins, 10 Paige, 183; Padgett v. Lawrence, id. 180, 181.

<sup>5</sup> Ante, § 774.

<sup>6</sup> Cory v. Bretton, 4 C. & P. 462, per Tindal, C. J.; Healey v. Thatcher, 8 C. & P. 388; Paddock v. Forrester, 3 Scott, N. R. 734; 3 M. & Gr. 903, S. C.; Jardine v. Sheridan, 2. & Kir. 24; Whiffen v. Hardwright, 11 Beav. 111; Hoghton v. Hoghton, 15 Beav. 821, Jones v. Foxall, id. 388.

tains any debt, and is no more than saying that he would give 20l. to be rid of the action.<sup>1</sup> So, in equity, it has been held, that the giving of a small sum in order to obtain the release of a right, could not be considered as an acknowledgment that a right existed; it amounts only to this—"I give you so much for not seeking to disturb me."<sup>2</sup> Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession,<sup>3</sup> will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appear to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being affected;<sup>4</sup> though, in this case, if the admission be merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the cause, it will be received.<sup>5</sup> The American courts have held, that evidence of the admission of any independent fact is receivable, though made during a treaty of compromise.<sup>6</sup>

§ 796. In the absence of any express, or strongly implied, § 721 restriction as to confidence, an offer of compromise is clearly admissible as *some* evidence of liability;<sup>7</sup> and although the offer of a less sum than the amount demanded will not, in general, support a count on an account stated, since it may be a mere offer to purchase peace;<sup>8</sup>—nor, perhaps, will an offer by the drawer of a bill, who is threatened with legal proceedings upon it, to give another bill by way of settlement, obviate the necessity of proving at the trial that he has received due notice of dis-

<sup>1</sup> B. N. P. 236, b.

<sup>2</sup> Underwood v. Ld. Courtown, 2 Sch. & Lef. 67, 68, per Ld. Redesdale.

<sup>3</sup> Thomson v. Austen, 2 D. & R. 361, per Bayley, J.

<sup>4</sup> Walldridge v. Kennison, 1 Esp. 144, per Ld. Kenyon, <sup>5</sup> Id.

<sup>6</sup> Mount v. Bogert, Anthon, 190, per Thompson, C. J.; Murray v. Coster,

4 Cowen, 635; Fuller v. Hampton, 5 Conn. 416, 426; Sanborn v. Neilson,

4 New Hamps. R. 501, 508, 509; Delogny v. Rentoul, 1 Mart. 175.

<sup>7</sup> Wallace v. Small, M. & M. 446, per Ld. Tenterden; Watts v. Lawson, id. 447, n., per id.; Nicholson v. Smith, 3 Stark. R. 129, per id.

<sup>8</sup> Wayman v. Hilliard, 7 Bing. 101; 4 M. & P. 729, S. C.

honour ;<sup>1</sup> yet there are occasions,—as, for instance, if the drawer of a bill, whose signature is in issue, has proposed a settlement,—when the fact of an offer having been made may be entitled to considerable weight.<sup>2</sup> In the case of *Thomas v. Morgan*,<sup>3</sup> however, where the defendant was sued for keeping mischievous dogs, which had killed three of the plaintiff's cattle, and it appeared that on being told of the injury done by them he had offered to settle for it, the court held, that though this was a fact, which in strictness should have been submitted to the jury as evidence of the scienter,<sup>4</sup> it was entitled to little, if any, weight, “as it might have been made from motives of charity without any admission of liability at all.” They therefore refused a new trial, though the question, whether the offer of compromise was not an admission of the defendant's liability, had not in point of fact been left to the jury, the attention of the judge at Nisi Prius not having been drawn to that particular point. After what has been said above, authorities need scarcely be cited to show, that admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual.<sup>5</sup>

§ 797. Before leaving this subject one word of caution may be added respecting a man's purchasing peace, where his conduct, though strictly upright and honourable, may be subjected to mis-

<sup>1</sup> *Cuming v. French*, 2 Camp. 106, n., per Ld. Ellenborough. See, post, § 806.

<sup>2</sup> *Harding v. Jones*, Tyr. & Gr. 135.

<sup>3</sup> 2 C. M. & R. 496 ; 5 Tyr. 1085, S. C. See, however, *Sayers v. Walsh*, 12 Ir. Law R. 435.

<sup>4</sup> The absurd doctrine of “scienter,” as applicable to mischievous dogs, no longer prevails in its entirety; though the law, notwithstanding four legislative attempts at amendment, still continues in a most unsatisfactory state. In Ireland, “the owner of every dog is liable in damages for injury done to any *sheep* by his dog,” whether such dog be mischievous or not; 25 & 26 V., c. 59, § 1, Ir. See, also, 23 & 29 V., c. 50, Ir. A somewhat similar amendment of the law has been introduced into England and Scotland, and has been extended in these countries to injuries caused by dogs to *sheep* or *cattle*; 26 & 27 V., c. 100, § 1, Sc.; 28 & 29 V., c. 60. The word “cattle” here used, includes horses, *Wright v. Pearson*, 4 Law Rep., Q. B. 582; 38 L. J., Q. B. 312; 10 B. & S. 723, S. C.

<sup>5</sup> *Gregory v. Howard*, 3 Esp. 113, per Ld. Kenyon; *Slack v. Buchannan*, Pea. R. 5, per id.



interpretation. Such a course is always pusillanimous, seldom gains its immediate object, and, if it fails, may be productive of irreparable injury to character. The council of a man who has once lent himself to such an arrangement, may feebly urge that he was actuated by motives of charity and benevolence; but the opponent will more loudly and successfully contend that his behaviour amounts to proof of a consciousness of misconduct; and the judge, while he rejects both these interpretations, will perform no easy task, should he induce the jury to ascribe it to the infirmity of one, who was reluctant to have his character and conduct questioned, and his name bandied about in the public papers. "Let this action," said Lord Ellenborough,—when Sir William Scott was sued for illegally excommunicating one Beaurain, whose animosity he had endeavoured to stifle by a gift,—“Let this action be a lesson for all men to stand boldly forward—to stand on their characters—and not, by compromising a present difficulty, to accumulate imputations on their honour.”<sup>1</sup>

§ 798.<sup>2</sup> In regard to admissions made under circumstances of *constraint*, the rule of law is this, that they cannot be received when obtained by illegal duress;<sup>3</sup> but that they are admissible, at least on the trial of civil actions,<sup>4</sup> if the compulsion under which they were made was legal. Thus affidavits sworn by a party in former legal proceedings, answers filed by him in Chancery in a former suit, evidence given by him in an action at law, or his examination taken in bankruptcy, will be evidence against himself in a subsequent cause; and this, too, though his subsequent opponent was a stranger to the prior proceeding,<sup>5</sup>—though he himself might, had he thought fit, have success-

<sup>1</sup> *Ld. Eldon's Life*, by Twiss, vol. ii., pp. 233—235, 2nd ed.

<sup>2</sup> *Gr. Ev.* § 193, in part.

<sup>3</sup> *Stockfleth v. De Tastet*, 4 Camp. 11, per *Ld. Ellenborough*; *Robson v. Alexander*, 1 M. & P. 448. As to what questions a witness may refuse to answer, see post, § 1453, et seq.

<sup>4</sup> As to their admissibility in *criminal* proceedings, see post, §§ 895—899.

<sup>5</sup> *Grant v. Jackson*, Pea. R. 203, per *Ld. Kenyon*; *Ashmore v. Hardy*, 7 C. & P. 501, 504, per *Patteson, J.*

fully demurred to the questions,<sup>1</sup>—though they were irrelevant to the matter before the court at the time of his examination, and were put to him for the purpose of procuring evidence in an action depending against him,<sup>2</sup>—and though he had no opportunity of fully explaining the testimony he had given. This last point may be illustrated by the case of *Collett v. Lord Keith*,<sup>3</sup> where in an action for taking the plaintiff's ship, the testimony of the defendant, given as a witness in an action between other parties, in which he admitted the taking of the ship, was allowed to be proved against him; though it appeared that, in giving his evidence, when he was proceeding to state his reasons for taking the ship, the judge had stopped him by saying that it was unnecessary for him to vindicate his conduct. The manner in which the evidence had been obtained was matter of observation to the jury; but as what was said bore directly on the issue, it could not be excluded as evidence of the fact. So, where a defendant had been examined before commissioners of bankrupts, and, though the whole of what he said had not been taken down, the portion that was reduced to writing had been read over and signed by him, this was held to be receivable against him as a statement of facts, the truth of which he had admitted.<sup>4</sup>

§ 799. It has been said that an admission, obtained under a compulsory examination, will not be evidence of an *account stated*; but the case in which this point arose, probably rests on the ground that the admission was there made to a third party,<sup>5</sup> while to support an account stated the admission must be made, either to the person to whom the money is owing, or to some one sent by him.<sup>6</sup> If, therefore, the admission were contained in an

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<sup>1</sup> *Smith v. Beadnell*, 1 Camp. 30, 33, per *Ld. Ellenborough*.

<sup>2</sup> *Stockfleth v. De Tastet*, 4 Camp. 10. If the commission has been perverted to improper purposes, the remedy is by an application to have the examination taken from the files and cancelled, *id.* 11, per *Ld. Ellenborough*.

<sup>3</sup> 4 Esp. 212, per *Le Blanc, J.*

<sup>4</sup> *Milward v. Forbes*, 4 Esp. 171, per *Ld. Ellenborough*.

<sup>5</sup> *Tucker v. Barrow*, 7 B. & C. 625, per *Littledale, J.*; 3 C. & P. 90; 1 M. & R. 518, S. C.

<sup>6</sup> *Breckon v. Smith*, 1 A. & E. 488; *Bates v. Townley*, 2 Ex. R. 156, 157.

answer to interrogatories, which is clearly an answer to the plaintiff in the suit, it would most probably be regarded as good evidence of an account stated.<sup>1</sup>

§ 800.<sup>2</sup> Passing now to a consideration of the *nature* of ad- § 725  
missions, it may be observed that no difference exists, in regard to their inadmissibility, between direct admissions, and those which are *incidental*, or made in some other connexion, or involved in the admission of some other fact. One or two cases illustrative of this rule have already been noticed, while treating of admissions made by solicitors;<sup>3</sup> but it may here be added, that in an action by the assignees of a bankrupt against an auctioneer, to recover the proceeds of a sale of the bankrupt's goods, the defendant's advertisement of the sale, in which he described the goods as "the property of D., a bankrupt," was held to be a conclusive admission that D. was a bankrupt, and that the defendant was acting under his assignees.<sup>4</sup> So, where a party, with a view of suing out a commission of bankruptcy against a trader, made an affidavit that the trader owed him 100*l.*, and was become bankrupt, he was not allowed afterwards to dispute the bankruptcy, when he was himself sued in trover by the assignees of the bankrupt, appointed under a second commission, for the price of some flour which he had clandestinely received from the trader, and applied to the discharge of his own debt.<sup>5</sup>

§ 801.<sup>6</sup> Other admissions are *implied from assumed character*; § 726  
for, whenever the existence of any domestic, social, or official relation is in issue, any recognition, whether by word or deed, of that relation, is *prima facie* evidence of its existence, as against the person making such recognition.<sup>7</sup> This rule is more frequently

<sup>1</sup> See *Bates v. Townley*, 2 Ex. R. 157, per Alderson, B.

<sup>2</sup> Gr. Ev. § 194, in part.

<sup>3</sup> Ante, § 773.

<sup>4</sup> *Maltby v. Christie*, 1 Esp. 342, as explained by Ld. Ellenborough in *Rankin v. Horner*, 16 East, 193.

<sup>5</sup> *Ledbetter v. Salt*, 4 Bing. 623; *Harmer v. Davis*, 7 Taunt. 577. See post, § 856, ad fin.

<sup>6</sup> Gr. Ev. § 195, in part.

<sup>7</sup> *Dickinson v. Coward*, 1 B. & A. 677, 679, per Ld. Ellenborough; recognised by Ld. Lyndhurst in *Inglis v. Spence*, 1 C. M. & R. 436.

applied against a person, who has recognised the character or office of another; but it embraces, in its principle, any representation or language in regard to himself. Thus,—to illustrate the second branch of the rule first,—where one has *assumed to act in an official character*, this is an admission of his appointment or title to the office, so far as to render him liable, even criminally, for misconduct or neglect in such office.<sup>1</sup> This doctrine has been held to apply, among other cases, to actions or prosecutions against clergymen, for non-residence;<sup>2</sup> against military officers, for returning false musters;<sup>3</sup> against popish priests, for remaining forty days within the kingdom, when this was considered an offence of no less magnitude than high treason;<sup>4</sup> against letter-carriers, for embezzlement;<sup>5</sup> and against solicitors,<sup>6</sup> toll-gatherers,<sup>7</sup> and collectors, for penalties.<sup>8</sup>

§ 802. So,—under the first branch of the rule,—where one has *recognised the official character of another*, by treating with him in such character or otherwise, this is at least *prima facie* evidence of his title against the party thus recognising it.<sup>9</sup> For instance, where a person had received credit from the renter of turnpike tolls, and had afterwards accounted with him in that character, and made him a partial payment, he was not permitted to question the legality of his appointment;<sup>10</sup> and where a farmer-general of post-horse duties brought an action for certain statute penalties against a person who let out horses for hire, proof of his appointment was waived, the defendant having previously accounted with

<sup>1</sup> See ante, § 171.

<sup>2</sup> *Bevan v. Williams*, 3 T. R. 635, *a*, per Ld. Mansfield.

<sup>3</sup> *R. v. Gardner*, 2 Camp. 513, per Ld. Ellenborough.

<sup>4</sup> *R. v. Kerue*, 7 How. St. Tr. 714; *R. v. Brommich*, *id.* 722; *R. v. Atkins*, *id.* 728. The Act of 27 El., c. 2, under which these poor wretches were tried, is now repealed by 7 & 8 V., c. 102.

<sup>5</sup> *R. v. Borrett*, 6 C. & P. 124, per Littledale and Bosanquet, Js., and Bolland, B. The prisoner was indicted under 2 W. 4, c. 4, now repealed by 24 & 25 V., c. 95.

<sup>6</sup> *Cross v. Kaye*, 6 T. R. 663.

<sup>7</sup> *Trowbridge v. Baker*, 1 Cowen, 251.

<sup>8</sup> *Lister v. Priestly*, Wightw. 67.

<sup>9</sup> *Peacock v. Harris*, 10 East, 104.

<sup>10</sup> See ante, §§ 173—175.

him as farmer-general.<sup>1</sup> So, the clerk of the trustees of a turn-pike road has not been allowed to show, that a person who had acted as one of the trustees, and had been treated as such by himself, while clerk, was not duly qualified;<sup>2</sup> and in an action by the trustee of a bankrupt against a debtor, who has made him a partial payment,<sup>3</sup> or has acknowledged his title in letters to the solicitor under the bankruptcy,<sup>4</sup> the plaintiff need not prove his title as trustee, though notice to dispute it has been given. Again, where a solicitor brought an action against a defendant for defamation, in charging him with swindling, and threatening to have him struck off the rolls, this threat was held to imply an admission that the plaintiff was a solicitor;<sup>5</sup> and in a similar action brought by a physician, where the plaintiff was spoken of as "Doctor L.," and the defendant, who was an apothecary, had made up medicines prescribed by him, the Court of Common Pleas was equally divided upon the question, whether the defendant's words and conduct amounted to an acknowledgment of the plaintiff's character.<sup>6</sup> In actions of this kind, however, if the words complained of charge a want of qualification and not mere misconduct, the plaintiff must prove that he possesses the character which has been impugned, for the slander in such case does not admit it.<sup>7</sup>

§ 803. The case of *Lipscombe v. Holmes*<sup>8</sup> affords a good example of both branches of the rule in question. That was an action for work and labour as a surgeon; and the defence was that the plaintiff was a physician, and therefore incapable, by the law then in force,<sup>9</sup> of maintaining an action for fees. It was

<sup>1</sup> *Radford v. M'Intosh*, 3 T. R. 632.

<sup>2</sup> *Pritchard v. Walker*, 3 C. & P. 212, per Vaughan, B.

<sup>3</sup> *Dickinson v. Coward*, 1 B. & A. 677.

<sup>4</sup> *Inglis v. Spence*, 1 C. M. & R. 432; *Crofton v. Poole*, 1 B. & Ad. 561.

<sup>5</sup> *Berryman v. Wise*, 4 T. R. 368.

<sup>6</sup> *Smith v. Taylor*, 1 N. R. 166; Sir J. Mansfield, and Heath, J., aff., *Rooke and Chambre, Js.*, neg.

<sup>7</sup> *Id.* 207; *Collins v. Carnegie*, 1 A. & E. 703, per Ld. Denman.

<sup>8</sup> 2 Camp. 441. See further on this subject, *R. v. Barnes*, 1 Stark. R. 243; *Cummin v. Smith*, 2 Serg. & R. 440; *Divoll v. Leadbetter*, 4 Pick. 220.

<sup>9</sup> See now 21 & 22 V., c. 90, § 31; *Gibbon v. Budd*, 32 L. J., Ex. 182, 2 (3563)

shown that he had written prescriptions and signed himself M. D., upon which Lord Ellenborough was on the point of nonsuiting him, saying that "if a person passes himself off as a physician, he must take the character cum onere." It appearing, however, that the defendant had paid money into court, his lordship thought that this act removed the objection, being tantamount to an admission of the plaintiff's right to sue as a surgeon.

§ 804.<sup>1</sup> Admissions implied from the *conduct* of the party are governed by the same principles; and although this class of admissions has already been adverted to, while treating of the law of presumptions,<sup>2</sup> it deserves further illustration in this place. Thus, an attempt by a plaintiff to suborn false witnesses is cogent evidence, in the nature of an admission by conduct, that his cause is an unrighteous one.<sup>3</sup> So, the suppression of documents is an admission that the contents were deemed unfavourable to the party suppressing them.<sup>4</sup> The entry of a charge to a particular person in a tradesman's book, or the making out of a bill of parcels in his name, is an admission that the goods were furnished on his credit.<sup>5</sup> The delivery, too, by a tradesman, of an invoice or account in which goods are described as bought from him, is strong, but not conclusive evidence, that he was the real vendor.<sup>6</sup> The omission of a claim by an insolvent in a schedule of the debts due to him given on oath, is an admission that it is not due; though whether it amounts to a conclusive admission may

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H. & C. 92, S. C.; and by-law by the Royal College of Physicians, that no *Fellow* of the Coll. shall be entitled to sue for fees. This by-law, it will be observed, does not extend to ordinary *members* of the Coll., and such persons may now sue by virtue of the Medical Act.

<sup>1</sup> Gr. Ev. § 196, in part.

<sup>2</sup> Ante, §§ 107, 116, 117, 178, 555.

<sup>3</sup> *Moriarty v. Lond. Chat. & D. Ry. Co.*, 39 L. J., Q. B. 109; 5 Law Rep., Q. B. 314, S. C.

<sup>4</sup> *James v. Bion*, and *Owen v. Flack*, 2 Sim. & St. 606, 607; *Bell v. Frankis*, 4 M. & Gr. 446; *Curlewis v. Corfield*, 1 Q. B. 814; 1 G. & D. 489, S. C.; *Clifton v. U. S.*, 4 Howard, S. Ct. R. 242; *R. v. Lond. Bright. & S. Coast Ry. Co.*, 20 L. J., M. C. 145, per Coleridge, J.; *Sutton v. Devonport*, 27 L. J., C. P. 54; *Edmonds v. Foster*, 45 L. J., C. P. 41.

<sup>5</sup> *Storr v. Scott*, 6 C. & P. 241, per Ld. Lyndhurst. See *Thomson v. Davenport*, 9 B. & C. 78, 86, 90, 91.

<sup>6</sup> *Holding v. Elliott*, 29 L. J., Ex. 134; 5 H. & N. 117, S. C. See post, § 1153.

be a question of some doubt.<sup>1</sup> Payment of money is an admission against the payer, that the receiver is the proper person to receive it; but not against the receiver, that the payer was the person who was bound to pay it; for the party receiving payment of a just demand may well assume, without inquiry, that the party tendering the money was the person legally bound to pay it.<sup>2</sup>

§ 805. Relief given at various times to a pauper while residing in another parish, is cogent, though not conclusive, evidence that he is settled in the relieving parish;<sup>3</sup> and even a single instance of such relief having been given will warrant a similar conclusion.<sup>4</sup> Of course the effect of such evidence will be much stronger, if the examination states a distinct head of settlement in the relieving parish, though the technical proof may fail to establish it satisfactorily.<sup>5</sup> On the other hand, the relief of a pauper, while residing in the relieving parish, is no evidence whatever of a settlement, however frequently it may have been bestowed;<sup>6</sup> but this rule rests, not so much on the absence of any presumption deducible from the conduct of the relieving parish, as on the impolicy of permitting such evidence to have any weight; for if parochial officers, by giving relief to a pauper, were to make evidence against themselves

<sup>1</sup> In *Nicholls v. Downes*, 1 M. & Rob. 13, Ld. Tenterden held it to be conclusive, apparently questioning *Hart v. Newman*, 3 Camp. 13, where Ld. Ellenborough treated it as entitled to little weight. See *Tilghman v. Fisher*, 9 Watts, 441.

<sup>2</sup> *James v. Biou*, 2 Sim. & St. 606; *Chapman v. Beard*, 3 Anstr. 942.

<sup>3</sup> *R. v. Barnsley*, 1 M. & Sel. 377, 380, per Ld. Ellenborough; *R. v. Wakefield*, 5 East, 335; *R. v. Stanley cum Wrenthorpe*, 15 East, 350; *R. v. East Winch*, 12 A. & E. 697; *R. v. Yarwell*, 9 B. & C. 894; 4 M. & R. 685, S. C.; *R. v. Carnarvonshire, Js.*, 2 Q. B. 325. Formerly the relief must have been given by the churchwardens and overseers in order to furnish evidence against the parish, but the board of guardians now represent for this purpose every parish within the union. See *R. v. Crondall*, 2 Sess. Cas. 667; 10 Q. B. 812, S. C.; and the clerk to the guardians represents the board; *R. v. Wigan*, 14 Q. B. 287.

<sup>4</sup> *R. v. Edwinstowe*, 8 B. & C. 671.

<sup>5</sup> *R. v. Bedingham*, 1 Sess. Cas. 114, per Ld. Denman.

<sup>6</sup> *R. v. Chatham*, 8 East, 498; *R. v. Trowbridge*, 7 B. & C. 252; 1 M. & R. 7, S. C.; *R. v. Coleorton*, 1 B. & Ad. 25; *R. v. St. Giles-in-the-Fields*, 5 Q. B. 872.

as to his settlement in their parish, they would perform their duty to casual poor with great reluctance.<sup>1</sup>

§ 806. A distinct promise by the drawer to pay, or indeed any acknowledgment by him of liability upon, a dishonoured bill,—as, for example, the suffering judgment by default in a prior action, brought by a former holder of the instrument,—will raise an inference that he has either received or waived due notice of dishonour,<sup>2</sup> and, in the case of a foreign bill, that it has been duly protested;<sup>3</sup> and a jury will be justified in coming to the same conclusion on less positive evidence; as, for instance, if the drawer, in disclaiming liability when threatened with an action, did not rest his defence on the want of notice, but on some different ground.<sup>4</sup> The maxim, *expressum facit cessare tacitum*, will here raise a presumption, which a defendant may find it difficult to rebut. The suing,<sup>5</sup> or distraining,<sup>6</sup> for rent accruing due since a forfeiture of which the lessor has had notice, as also the acceptance of such rent,<sup>7</sup> and, perhaps, even the mere demand of it,<sup>8</sup> will,—unless an action to recover the property

<sup>1</sup> *R. v. Chatham*, 8 East, 501, per *Ld. Ellenborough*; *R. v. Coleorton*, 1 B. & Ad. 27, per *Bayley, J.*

<sup>2</sup> *Rabey v. Gilbert*, 30 L. J., Ex. 170; 6 H. & N. 536, S. C.; *Woods v. Dean*, 32 L. J., Q. B. 1; 3 B. & S. 101, S. C.; *Cordery v. Colvin*, 14 Com. B., N. S. 374; S. C. nom. *Cordery v. Colville*, 32 L. J., C. P. 210; *Killby v. Rochussen*, 18 Com. B., N. S. 357.

<sup>3</sup> *Hicks v. D. of Beaufort*, 4 Bing. N. C. 229, 232; *Campbell v. Webster*, 2 Com. B. 258; *Patterson v. Becher*, 6 Moore, 319; *Brownell v. Bonney*, 1 Q. B. 39; *Pardoe v. O'Connor*, 12 Ir. Law R. 63. See *Bell v. Frankia*, 4 M. & Gr. 446; *Holmes v. Staines*, 3 C. & Kir. 19.

<sup>4</sup> *Wilkins v. Jadia*, 1 M. & Rob. 41, per *Ld. Tenterden*; *Curlewis v. Corfield*, 1 Q. B. 814; 1 G. & D. 489, S. C. See ante, § 796.

<sup>5</sup> *Roe v. Minshal*, cited B. N. P. 96, c; *Dendy v. Nicholl*, 27 L. J., C. P. 220; 4 Com. B., N. S. 376, S. C. See *Toleman v. Portbury*, 6 Law Rep., Q. B. 245; 40 L. J., Q. B. 125, S. C.; in *Ex. Ch.*, S. C. 41 L. J., Q. B. 96; and 7 Law Rep., Q. B. 344.

<sup>6</sup> *Doe v. Peck*, 1 B. & Ad. 428; *Cotesworth v. Spokes*, 30 L. J., C. P. 220; 10 Com. B., N. S. 103, S. C.; *Ward v. Day*, 33 L. J., Q. B. 3, 254; 4 B. & S. 337; and 5 B. & S. 359, S. C.

<sup>7</sup> *Warwick v. Hooper*, 3 M. & Gord. 60, 69, per *Ld. Truro, C.*; *Croft v. Lumley*, 25 L. J., Q. B. 73; 5 E. & B. 648, S. C.; 27 L. J., Q. B. 321, S. C. in *Dom. Proc.*; 6 H. of L. Cas. 672, S. C.; *Price v. Worwood*, 4 H. & N. 512; *Davenport v. The Queen*, L. R., 3 App. Cas. 115, per *Pr. C.*; 47 L. J., P. C. 8, S. C. See *Keene v. Biscoe*, 47 L. J., Ch. 644.

<sup>8</sup> *Doe v. Birch*, 1 M. & W. 402.



has actually been brought,<sup>1</sup>—amount to an acknowledgment of the tenancy on the part of the lessor, and will, consequently, waive the forfeiture;<sup>2</sup> though, if the breach be a continuing one, as the using rooms in a prohibited manner, or the omitting to keep premises insured or repaired, the acceptance of rent after such breach will not waive the forfeiture incurred by subsequent user or omission.<sup>3</sup> A notice to quit will also in general be regarded as waived, if the landlord accepts rent subsequently accruing due, or puts in a distress for *such* rent, or does any other act amounting to a recognition of an existing tenancy, after the expiration of the time when the tenant ought to have quitted according to the notice.<sup>4</sup> Whether a simple demand of rent subsequently accruing due, or the bringing of an action for such rent, will operate as a waiver of a notice to quit, is a question not of law, but of fact, which must consequently be determined by the jury.<sup>5</sup> And here it must be remembered that, as a notice to quit,—provided it be a valid notice,<sup>6</sup>—has the legal effect of determining a tenancy, the waiver of such notice does not revive the tenancy thus determined, but creates a new one.<sup>7</sup>

§ 807. The doctrine of implied waiver, as applicable to the law of landlord and tenant, is not now recognised in Ireland, the Act of 23 & 24 V., c. 154, having expressly enacted, in § 43, that where any lease, made after the 1st of January, 1861, shall contain or imply any condition, covenant, or agreement to be observed or performed on the part of the tenant, no act done or suffered by the landlord shall be deemed a dispensation therewith, or a waiver of

<sup>1</sup> Grimwood v. Moss, 7 Law Rep., C. P. 360; 41 L. J., C. P. 239, S. C.

<sup>2</sup> Goodright v. Davids, 2 Cowp. 803; Walrond v. Hawkins, 44 L. J., C. P. 116; 10 Law Rep., C. P. 342, S. C. Roe v. Harrison, 2 T. R. 430, 431; Doe v. Allen, 3 Taunt. 78; Doe v. Rees, 4 Bing. N. C. 384; Arnsby v. Woodward, 6 B. & C. 519.

<sup>3</sup> Doe v. Woodbridge, 9 B. & C. 376; Doe v. Peck, 1 B. & Ad. 428; Hyde v. Watts, 12 M. & W. 254; Price v. Worwood, 4 H. & N. 512; Doe v. Gladwin, 6 Q. B. 953, 963; Doe v. Jones, 5 Ex. R. 498. See post, § 847.

<sup>4</sup> Zouch v. Willingale, 1 H. Bl. 311; Goodright v. Cordwent, 6 T. R. 219; Doe v. Batten, 1 Cowp. 243; Doe v. Calvert, 2 Camp. 388.

<sup>5</sup> Blyth v. Dennett, 13 Com. B. 178; Doe v. Batten, 1 Cowp. 243; Vance v. Vance, 1 R., 5 C. L. 363.

<sup>6</sup> See Holme v. Brunskill, L. R., 3 Q. B. D. 495, per Ct. of App.; 47 L. J., Q. B. 610, S. C.; Ahearn v. Bellman, L. R., 4 Ex. D. 201, per Ct. of App.

<sup>7</sup> Tayleur v. Wildin, 3 Law Rep., Ex. 303; 37 L. J., Ex. 173, S. C.

the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord, or his authorised agent, in writing under his hand.

§ 808. The class of admissions now under discussion has, however, on another occasion, been partially recognised by the Legislature, which, for the sake of promoting substantial justice, has drawn a conclusive inference from particular conduct. Thus, if a lease granted under a power be invalid by reason of some deviation from the terms of the power, the acceptance of rent under it will,—by virtue of the Act of 13 & 14 V., c. 17, § 2,—be deemed a confirmation of the lease as against the person accepting the rent; provided such person, or some one else by his authority, shall, before or at the time of accepting the rent, sign a receipt, memorandum, or note in writing, confirming such lease. § 732

§ 809.<sup>1</sup> Admissions may also be implied from the *acquiescence* of the party. But acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party.<sup>2</sup> And whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood, by the party, before any inference can be drawn from his passiveness or silence.<sup>3</sup> The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated.<sup>4</sup> Thus, where a landlord quietly suffers a tenant to expend money in making alterations and improvements on the premises, it is evidence of his consent to the alterations;<sup>5</sup> though the mere lying by and passively witnessing a breach of covenant for several years, is not such an acquiescence as

<sup>1</sup> 1 Gr. Ev. § 197, in great part.

<sup>2</sup> *Allen v. McKeen*, 1 Sumn. 314.

<sup>3</sup> See *Smith v. Hayes*, 1 R., 1 C. L. 333; *Davies v. Marshall*, 10 Com. B., N. S. 697; *Bickett v. Morris*, 1 Law Rep., H. L. Sc. 57.

<sup>4</sup> *Melen v. Andrews*, M. & M. 336; explained in *Simpson v. Robinson*, 12 Q. B. 512, per Ld. Denman; *R. v. Newman*, 1 E. & B. 268; *Boyd v. Bolton*, 1 Ir. Eq. R. 33. See *Bigg v. Strong*, 3 Sm. & Giff. 592.

<sup>5</sup> *Doe v. Allen*, 3 Taunt. 78, 80; *Doe v. Pye*, 1 Esp. 366, per Ld. Kenyon; *Neale v. Parkin*, 1 Esp. 229, per id. See, also, *Stanley v. White*, 14 East, 332; *Cotching v. Bassett*, 32 L. J., Ch. 286, per Romilly, M. R.; 32 Beav. 101, S. C.

to amount to a waiver of the forfeiture.<sup>1</sup> Again, if a tenant, on *personally* receiving notice to quit on a particular day, makes no objection, he will generally, in England,<sup>2</sup> be deemed to have admitted that his tenancy expires on that day;<sup>3</sup> but if he cannot read, or even if he did not read the notice in the presence of the person serving it upon him, it will be treated as a notice not personally served,<sup>4</sup> and will go for nothing.<sup>5</sup> Thus, also, a debtor being inquired for, and hearing himself denied, may thereby furnish some evidence against himself that he is beginning to keep house with intent to defeat or delay his creditors, and, consequently, is committing an act of bankruptcy;<sup>6</sup> and, in general, where one knowingly avails himself of another's acts done for his benefit, the jury will be justified in considering such conduct as an admission of his obligation to pay a reasonable compensation.<sup>7</sup> So, where an executor, in an administration action, had been served with notice of motion to pay into court part of the testator's estate, which was sworn by affidavit to have reached his hands, Sir George Jessel,—though he declined, in accordance with the rule in Equity, to rely simply on the proof afforded by the affidavit—was yet induced to hold that the silence of the defendant, in not disputing the facts deposed to, was a sufficient admission of their truth to

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<sup>1</sup> *Doe v. Allen*, 3 Taunt. 78; *Perry v. Davis*, 3 Com. B., N. S. 769. But see ante, § 806.

<sup>2</sup> In Ireland, however, the law is regulated, in part, by § 6 of 23 & 24 V., c. 154, and in part, by s. 58 of 33 & 34 V., c. 46. The former Act enacts, that "every tenancy from year to year shall be presumed to have commenced on the last gale day of the calendar year on which rent has become due and payable in respect of the premises, until it shall appear to the contrary." This law, though called a presumption, is, in fact, a mere arbitrary rule, badly expressed.

<sup>3</sup> *Doe d. Leicester*, 2 Taunt. 109; *Thomas v. Thomas*, 2 Camp. 647; *Doe v. Forster*, 13 East, 405; *Oakapple v. Copous*, 4 T. R. 361; *Doe v. Wombwell*, 2 Camp. 559, per *Ld. Ellenborough*. See *Walker v. Godé*, 30 L. J., Ex. 172; 6 H. & N. 594, S. C.

<sup>4</sup> *Doe v. Calvert*, 2 Camp. 388, per *Ld. Ellenborough*, explained in 2 Camp. 648.

<sup>5</sup> *Thomas v. Thomas*, 2 Camp. 649; *Doe v. Forster*, 13 East, 405.

<sup>6</sup> *Key v. Shaw*, 8 Bing. 320. See 46 & 47 V., c. 52, § 4, subs. 1 (D).

<sup>7</sup> *Morris v. Burdett*, 1 Camp. 218, per *Ld. Ellenborough*, where a candidate not bound by statute to pay for the hustings erected for an election, had made use of them. *Abbot v. Hermon*, 7 Greenl. 118, where a schoolhouse was used by the school district; *Hayden v. Madison*, *id.* 78.

justify the making of the order.<sup>1</sup> So, in settlement law, where two brothers, claiming derivative settlements from their father, were removed by successive orders, and the examination of the father proving his settlement was served upon the appellants together with the first order, against which there was no appeal, the fact of the appellants not objecting to the *ground of removal* when they received the first son, was held to be some slight evidence of an admission that the father was settled in their parish; and, consequently, although an appeal against the second order the first was inadmissible,<sup>2</sup> the father's examination was received as part of the evidence of such admission.<sup>3</sup>

§ 810. The raising an objection to one item of an account, § 734 no remark being made as to the rest, will be evidence of an account stated as to those items to which no objection has been made;<sup>4</sup> and, *among merchants*, an account rendered will be regarded as allowed, if it be not objected to within a second or third post,<sup>5</sup> or, at least, if it be kept for any length of time without making an objection.<sup>6</sup> With respect to ordinary accounts, however, a distinction has been taken in Ireland between such as are *sent by post*, and those *delivered by hand*; and it has been held that the former, though kept by the party to whom they were sent without observation, are not admissible against him, as evidence that he had acquiesced in their contents.<sup>7</sup> In the case where this point was determined, Chief Justice Bushe remarked, that what a party *says* upon an account furnished to him, or upon a statement made in his presence, may be given in evidence against him along with the account or statement, because what is thus offered is the act or declaration of the party to be affected by it, and the account or the statement is by reference made a part of such act or declaration; but the naked fact that an account remains in the pos-

<sup>1</sup> Freeman v. Cox, L. R., 8 Ch. D. 148; 47 L. J., Ch. 560, S. C. See also, Hampden v. Wallis, L. R., 27 Ch. D. 251, per Chitty, J.

<sup>2</sup> On the authority of R. v. Duch. of Kingston, 20 How. St. Tr. 538, n.

<sup>3</sup> R. v. Sow, 4 Q. B. 93.

<sup>4</sup> Chisman v. Count, 2 M. & Gr. 307.

<sup>5</sup> Sherman v. Sherman, 2 Vern. 276, per Hutchins, Ld. Com.

<sup>6</sup> Willis v. Jernegan, 2 Atk. 252, per Ld. Hardwicke; Tickel v. Short, 2 Ves. Sen. 239, per id., where the account had been kept without objection for two years.

<sup>7</sup> Price v. Ramsay, 2 Jebb & Sy. 338.

session of a party to whom it was sent, cannot amount to an acquiescence in its contents. His lordship added, that the admission of such evidence would countenance the notion, that a man might, by furnishing an account claiming a balance against his *creditor*, establish an acquittance for himself.<sup>1</sup>

§ 811. The *same distinction between letters and oral statements* § 735 has been partially recognised in England. "What is said to a man before his face," observed Lord Tenterden in *Fairlie v. Denton*,<sup>2</sup> "he is in some degree called on to contradict, if he does not acquiesce in it;"<sup>3</sup> but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains." Lord Denman, also, in a later case, declared, that "it was a great deal too broad a proposition to say, that every paper which a man might hold, purporting to charge him with a debt or liability, was evidence against him if he produced it."<sup>4</sup> In *Gaskill v. Skeene*,<sup>5</sup> however, the Court of Queen's Bench subsequently held, that letters containing a demand, written to a defendant, and unanswered by him, were admissible in evidence for the plaintiff, though they also stated facts showing how the demand arose; but possibly that case rested on the ground, that the defendant had made some unsatisfactory statements respecting these letters, in a subsequent conversation with the plaintiff's agent. On this last ground unanswered letters written to a party have been admitted as evidence in America.<sup>6</sup>

§ 812. Letters and other papers found in a party's possession § 736 will occasionally, in a civil suit, be evidence against him, as raising a *prima facie* inference that he knows their contents and has acted upon them;<sup>7</sup> and they are frequently received in criminal prosecu-

<sup>1</sup> *Price v. Ramsay*, 2 Jebb & Sy. 342, 343.

<sup>2</sup> 3 C. & P. 103.

<sup>3</sup> This doctrine, by the by, would justify much speaking at St. Stephen's.

<sup>4</sup> *Doe v. Frankis*, 11 A. & E. 795.

<sup>5</sup> 19 L. J., Q. B. 275; 14 Q. B., 664, S. C. See, also, *Keen v. Priest*, 1 Fost. & Fin. 314; *Lucy v. Moufflet*, 29 L. J., Ex. 112; 5 H. & N. 229, S. C.; *Carne v. Steer*, 29 L. J., Ex. 281; 5 H. & N. 628, S. C.; and *Gore v. Hawsey*, 3 Fost. & Fin. 509, per Martin, B.

<sup>6</sup> *Dutton v. Woodman*, 9 Cush. 262.

<sup>7</sup> *Hewitt v. Piggott*, 9 C. & P. 75.

tions, especially those for conspiracy and treason, though their weight, as evidence against the prisoner, will in a great measure depend on the fact, whether answers to them can be traced, or whether anything can be shown to have been done upon them.<sup>1</sup> So,<sup>2</sup> also, the opportunity of constant access to documents may sometimes, by raising a presumption that their contents are known, afford ground for affecting parties with an implied admission of the truth or correctness of such contents.<sup>3</sup> Thus, the rules of a club, or the record of the proceedings of a society, contained in a book kept by the proper officer and accessible to the members,<sup>4</sup>—charges against a club, entered by the servants of the house in a book kept for that purpose open in the club-room,<sup>5</sup> and the like, —are admissible against the members; their knowledge of the contents of the books, and their acquiescence therein, being presumable under the circumstances. On similar grounds, books of account which have been kept between master and servant, tradesman and shopman, banker and customer, or co-partners, will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities for testing from time to time the accuracy of the entries.<sup>6</sup>

§ 813.<sup>1</sup> But in regard to admissions inferred from *acquiescence* § 731  
*in the oral statements of others*, the maxim *Qui tacet consentire videtur*,—however it may be recognised by the lover,—must by the lawyer be applied with careful discrimination. “Nothing,” it has been observed, “can be more dangerous than this kind of

<sup>1</sup> *R. v. Horne Tooke*, 25 How. St. Tr. 120, 121, per Eyre, C. J.; *R. v. Watson*, 2 Stark. 140; 32 How. St. Tr. 349, 351, S. C.

<sup>2</sup> Gr. Ev. § 198, in part.

<sup>3</sup> See, however, *Hallmark's Case*, 47 L. J., Ch. 868, per Ct. of App.; *L. R.* 9 Ch. D. 329, S. C.; disapproving of *Wheatcroft's Case*, 42 L. J., Ch. 853; and *Ex. p. Brown*, 19 Beav. 97, 104.

<sup>4</sup> *Raggett v. Musgrave*, 2 C. & P. 556, per Abbott, C. J.; *Alderson v. Clay*, 1 Stark. R. 405, per Ld. Ellenborough; *Ashpitel v. Sercombe*, 5 Ex. R. 147.

<sup>5</sup> *Wiltzie v. Adamson*, 1 Ph. Ev. 357.

<sup>6</sup> *Symonds v. Gas Light and Coke Co.*, 11 Beav. 283, 287; *Boardman v. Jackson*, 2 Ball & B. 382; *Kilbee & Sneyd*, 2 Moll. 193; *Lodge v. Prichard*, 3 De Gex, M. & G. 906; *Rules of Sup. Ct. 1883*, Ord. XXXIII. R. 3; and 30 & 31 V., c. 44, § 159, Ir., cited ante, § 711.

<sup>7</sup> Gr. Ev. § 199, in great part.

evidence. It should always be received with caution : and never ought to be received at all, unless the evidence is of direct declarations of that kind, which naturally calls for contradiction ; some assertions made to the party with respect to his right, which by his silence he acquiesces in.”<sup>1</sup> A *distinction* has accordingly been taken *between declarations made by a party interested and those made by a stranger* ; and while what one party declares to the other without contradiction is admissible evidence, what is said to a party by a third person may well be inadmissible. It may be impertinent, and be best rebuked by silence.<sup>2</sup> Still less will statements made by strangers in the presence of a party be receivable against him, if they be *not directly addressed* to him ; because, in such case, he can scarcely under any circumstances be called upon to interfere. Therefore, where in a real action, upon a view of the premises by a jury, one of the chainbearers was the owner of a neighbouring close, respecting the bounds of which the litigating parties had much altercation, their declarations in his presence were held inadmissible against him, in a subsequent action respecting his own close.<sup>3</sup>

§ 814. Moreover, to affect one person with the statements of ? 738 others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, but they must also have been made on an *occasion, when a reply from him might be properly expected*.<sup>4</sup> Depositions, therefore, taken in the presence of a party during a judicial investigation, observations made by a magistrate to the parties before him, and confessions of an accomplice criminating his co-prisoner before the justices, will not, in general,<sup>5</sup> be evidence in any subsequent trial, whether

<sup>1</sup> Moore v. Smith, 14 Serg. & R. 393, per Duncan, C. J.

<sup>2</sup> Child v. Grace, 2 C. & P. 193, per Best, C. J.

<sup>3</sup> Moore v. Smith, 14 Serg. & R. 388.

<sup>4</sup> Boyd v. Bolton, 8 Ir. Eq. R. 113.

<sup>5</sup> This cannot be laid-down as a strict rule of law applicable on all occasions ; for as Ld. Denman observed, in Simpson v. Robinson, 12 Q. B. 512, “cases may certainly be conceived, in which a party, by not denying a charge made against him in a court of justice, may possibly afford strong proof that the imputation is just.” See R. v. Coyle, 7 Cox, 74.

civil or criminal, against the party who heard them in silence ; because in judicial inquiries a regularity of proceeding is adopted, which often prevents a person from interfering when and how he pleases, as he naturally would do in a common conversation.<sup>1</sup> The same inferences cannot, therefore, be drawn from his silence or his conduct on such occasions, as might reasonably result from similar behaviour, were he under no restraint ; and as it is only for the sake of these inferences that the statements of other parties can ever be admitted, they are properly rejected whenever they do not warrant the inferences sought to be drawn from them. A similar distinction has been recognised in the civil law, by which "*confessio facta seu præsumpta ex taciturnitate in aliquo iudicio, non nocebit in alio.*"<sup>2</sup>

§ 815. If, however, the statement of one person calls forth a *reply* from another, such statement may then be read in conjunction with the reply, and will become evidence against the party replying so far as the answer directly or indirectly admits its truth ; and it will make no difference in the application of this rule, whether the words were spoken by an interested party or a stranger,—whether they were addressed or not to the party replying,—or whether they fell from the parties, the witnesses, or the court, in a judicial proceeding, or were uttered during the course of an ordinary conversation.<sup>3</sup> § 739

§ 816.<sup>4</sup> But the *silence* of the party, even where the declarations are addressed to himself, at a time too when he is at full liberty to reply as he thinks fit, is, at best, worth very little as evidence of acquiescence ;<sup>5</sup> and if he has no means of knowing the truth or falsehood of the statement, the fact that he did not, in terms deny § 740

<sup>1</sup> *Melen v. Andrews*, M. & M. 336, per Parke, J.; *Short v. Stoy*, cited in *Roscoe Ev.* 54, 55, as ruled by Alderson, B.; *R. v. Appleby*, 3 Stark. R. 33, per Holroyd, J.; *R. v. Turner*, 1 Moo. C. C. 347, 348, per Patteson, J.; *Child v. Grace*, 2 C. & P. 193.

<sup>2</sup> 1 Masc. de Prob., concl. 348, n. 31.

<sup>3</sup> *Child v. Grace*, 2 C. & P. 193; *Jones v. Morrell*, 1 C. & Kir. 266, per Ld. Denman; *R. v. Edmunds*, 6 C. & P. 164, per Tindal, C. J.; *Boyd v. Bolton*, 8 Ir. Eq. R. 113.

<sup>4</sup> Gr. Ev. § 199, in part.

<sup>5</sup> See Ch. 26 of St. Matthew, v. 59—63; and Ch. 27, v. 12—14.  
(3574)



it is almost valueless.<sup>1</sup> In all these cases it must be distinctly remembered, that the statement made in the party's presence or hearing<sup>2</sup> is not evidence against him, but his own conduct in consequence of such statement is the sole evidence. Magistrates often make mistakes on this subject; but it is highly important that the distinction should be observed.<sup>3</sup>

§ 817.<sup>4</sup> The effect of admissions, when proved, must next be considered; and with regard to their *conclusiveness*, it is first to be observed, that the policy of the law favours the investigation of truth by all expedient methods; and that the doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded.<sup>5</sup> It is also to be observed, that estoppels bind only parties and privies; and not strangers. Hence it follows that a sheriff, who, being armed with a writ of execution in favour of a creditor, seizes goods as the property of the debtor, is not bound by an estoppel which would have prevented the debtor himself from claiming the goods.<sup>6</sup> Neither, as it seems, would the trustee of a bankrupt be bound by the bankrupt's written admissions, because the court would regard the trustee as claiming adversely to the bankrupt.<sup>7</sup> Again, though a stranger may often rely on an admission, which parties or privies might have specially pleaded by way of estoppel, yet, in his case it is only matter of evidence, to be considered by the jury. This subject was very clearly illustrated by Mr. Justice Bayley, in the case of *Heane v. Rogers*,<sup>8</sup> which was an

<sup>1</sup> *Hayslep v. Gymer*, 1 A. & E. 165, per Parke, J. See, further, on the subject of tacit admissions, *The State v. Rawls*, 2 Nott & M'C. 301; *Batturs v. Sellers*, 5 Har. & J. 117, 119.

<sup>2</sup> See *Neile v. Jakle*, 2 C. & Kir. 709.

<sup>3</sup> Per Alderson, B., at Maidstone Sp. Ass. 1842, MS.; *Doe v. Frankis*, 11 A. & E. 793, per Ld. Denman.

<sup>4</sup> Gr. Ev. § 204, in part.

<sup>5</sup> See ante, § 89.

<sup>6</sup> *Richards v. Johnson*, 4 H. & N. 660; overruling the decision of Channell, B., in S. C., reported 1 Fost. & Fin. 447.

<sup>7</sup> *Harris v. Rickett*, 4 H. & N. 6, per Bramwell, B.

<sup>8</sup> 9 B. & C. 577, 586, 587. See *Morgan v. Couchman*, 14 Com. B. 100; *Painter v. Abel*, 3 Fost. & Fin. 518, per Erle, C. J.; *Welland Canal Co. v. Hathaway*, 8 Wend. 483; *Jennings v. Whittaker*, 4 Monroe, 50. See, also, Ld. Lonsborough's case, 4 De Gex, M. & G. 411; and Ld. Lonsborough v. Foster, 3 B. & S. 805.

action of trover, brought by a person, who had been declared a bankrupt, against his assignees, to recover the value of goods, which, as assignees, they had sold. The defendants contended that the plaintiff was estopped from bringing this action, as, in addition to other evidence of his acquiescence in their title, it appeared that, after the issuing of the commission, he had given notice to the lessors of a farm which he held, that he had become bankrupt, and was willing to give up the lease, whereupon the lessors accepted the lease, and took possession of the premises. The question, therefore, was, whether he was precluded by this surrender from disputing the commission in the present suit.

§ 818. On this point the language of the learned judge was as follows:—"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound. It is a well established rule of law, that estoppels bind only parties and privies, not strangers.<sup>1</sup> The offer of surrender made in this case was to a *stranger to this suit*; and though the bankrupt may have been bound by his representation that he was a bankrupt, and his acting as such, as between him and the stranger to whom that representation was made, and who acted upon it, he is not bound as between him and the defendants, who did not act on the faith of that representation at all. The bankrupt would probably not have been permitted, as against his landlords,—whom he had induced to accept the lease without a formal surrender in writing, and to take possession, upon the supposition that he was a bankrupt, and entitled under 6 G. 4, c. 16, § 75, to give it up,—to say afterwards that he was not a bankrupt, and bring an action of trover for the lease, or an ejectment for the estate. To that

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<sup>1</sup> Co. Lit. 352 a.; Com. Dig. Estop. C.

extent he would have been bound, probably no further, and certainly not as to any other persons than those landlords. This appears to us to be the rule of law, and we are of opinion that the bankrupt was not by law, by his notice and offer to surrender, estopped; and indeed it would be a great hardship if he were precluded by such an act. It is admitted that his surrender to his commissioners is no estoppel, because it would be very perilous to a bankrupt to dispute the commission, and to try its validity by refusing to surrender.<sup>1</sup> A similar observation, though not to the same extent, applies to this act; for whilst his commission disables him from carrying on his business, and deprives him for the present of the means of occupying his farm with advantage, it would be a great loss to the bankrupt to continue tenant; paying a rent and remaining liable to the covenants of the lease, and deriving no adequate benefit; and it cannot be expected that he should incur such a loss, in order to be enabled to dispute his commission with effect. It is reasonable that he should do the best for himself in the unfortunate situation in which he is placed."

§ 819. The doctrine propounded in *Heane v. Rogers*,<sup>2</sup> that a party is always at liberty to prove that his admissions were founded on *mistake*, unless his opponent has been induced by them to alter his condition, is as applicable to mistakes in respect of legal liability, as to those in respect of matters of fact.<sup>3</sup> In all cases, therefore, of this nature, the jury, with the view of estimating the effect due to an admission, will be justified in considering the circumstances under which it was made; and if it should appear to have been made under an erroneous notion of legal liability, they may qualify its effect accordingly.<sup>4</sup> § 743

§ 820. In a former part of this work, we have treated of estoppels by deed, alluded to those by record, and discussed that particular class of estoppels in pais, which relates to the rights of landlord and tenant;<sup>5</sup> and in the present chapter it has already been shown § 744

<sup>1</sup> See *Flower v. Herbert*, 2 Ves. Sen. 326.

<sup>2</sup> 9 B. & C. 577.

<sup>3</sup> *Newton v. Liddiard*, 12 Q. B. 927, per *Ld. Denman*.

<sup>4</sup> *Newton v. Belcher*, 1 Q. B. 921; and *Newton v. Liddiard*, 12 Q. B. 925.

<sup>5</sup> *Ante*, §§ 89—103.

that admissions solemnly made in the course of judicial proceedings, whether as a substitute for regular proof, or in a case stated for the opinion of the court, are on motives of policy and justice, deemed to be conclusive.<sup>1</sup> It remains, then, only to examine the law as it regards other *conclusive admissions*; and these will, in general, be found to range themselves under one or other of the following heads. First, admissions expressly or tacitly made by *pleadings*; secondly, admissions which have been *acted upon* by others. To these may be added a few cases of fraud and illegality, and some admissions on oath, where the party is estopped on grounds of public policy.

§ 821. With respect to *admissions by pleading*, it was at one § 75 time thought that a party might, by bringing an action on a contract, estop himself from denying the obligatory force of the agreement in a subsequent action against himself. In conformity with this view of the law, a strong opinion was expressed by Chief Justice Tindal, in the case of the Fishmongers' Company v. Robertson,<sup>2</sup> that if a corporation were to enter into an executory contract, which was invalid against themselves for not being under seal, and were then to sue thereon, this would amount to an admission on record, that such contract was duly entered into on their part, so as to be obligatory on them; and such admission would estop them in a *cross action*, from setting up an objection that it was not sealed by their common seal. The doctrine, thus propounded, has on several occasions been brought under the notice of the courts; but although it is unquestionably based on substantial justice, it has hitherto met with little favour, and will probably ere long be expressly overruled.<sup>3</sup> The law, as at present understood, seems to be, that the statements which are contained in any pleading, though binding on the party making them for all purposes in the cause, ought not to be regarded in any subsequent action as admissions of the truth of the facts stated.<sup>4</sup>

<sup>1</sup> Ante, §§ 772, 783.

<sup>2</sup> 5 M. & Gr. 192, 193.

<sup>3</sup> See *Copper Miners' Co. v. Fox*, 16 Q. B. 229; *Boileau v. Rutlin*, 2 Ex. R. 681, per Parke, B.; *Buckmaster v. Meiklejohn*, 8 Ex. R. 637, per id.; *The May. of Kidderminster v. Hardwicke*, 43 L. J., Ex. 9; 9 Law Rep., Ex. 13, S. C.

<sup>4</sup> Cases cited in last note.

§ 822. Still less will any admission, which has been *incidentally* § 746 or *tacitly* made in pleading in one suit, estop the party who has made it from denying in another suit, where *precisely the same matter is not litigated*, the fact so admitted. For instance, where a plea to an action on a bond set out a corrupt agreement between the parties irrespective of the bond, and then went on to aver that the bond was given to secure, among other moneys, the sum mentioned in the *said* agreement; and the replication, tacitly admitting the corrupt agreement, traversed the fact of the bond having been given in consideration thereof, but the plaintiff failed on this issue; it was held, that the admission was available for the purpose of that suit only; and, consequently, the plaintiff was at liberty to dispute the corrupt nature of the agreement, in a subsequent action on a deed, which was signed by the defendant at the same time with the bond by way of collateral security.<sup>1</sup>

§ 823. Although, as a general rule, an admission made in one § 747 suit by pleading or omitting to plead, cannot conclusively bind the party in any subsequent suit, an exception to this rule must be recognised, where the second action is brought on a judgment recovered in the first. For example, if an executor or administrator confess judgment, or suffer it to go against him by default, he thereby admits assets in his hands, and is estopped to say the contrary in an action on such judgment, suggesting a *devastavit*.<sup>2</sup> Some proof must indeed be given that the assets have been wasted, in order to charge the executor or administrator personally in such a case; but the slightest evidence will suffice for this purpose; and the mere issuing of a writ of *feri facias*, directed to the county where the action was laid, and a return of *nulla bona* thereto, has, for a long time past, been deemed evidence enough.<sup>3</sup> So, where, to an action against three executors, two had pleaded *plene adminis-*

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<sup>1</sup> *Carter v. James*, 13 M. & W. 137. See *Rigge v. Burbidge*, 15 M. & W. 598; 4 Dowl. & L. 1, S. C.; and *Hunt v. Morrell*, 3 Ex. R. 241, per Pollock, C. B.

<sup>2</sup> *Skelton v. Hawling*, 1 Wils. 258; *Re Trustee Relief Act, Higgins' Trusts*, 2 Giff. 502.

<sup>3</sup> *Leonard v. Simpson*, 2 Bing. N. C. 176, 180, per Tindal, C. J.; 2 Scott, 335, S. C.

traverunt, and the third had admitted assets to the amount of 383*l.*, the court held, that, in a subsequent action against the third executor, suggesting a devastavit, the plaintiff was entitled to recover, on proof that the 383*l.* had been deposited with bankers to the credit of the executorship account, and that the defendant, after judgment in the former action, had given the plaintiff a cheque for the amount, which was dishonoured, as not being signed by the co-executors.<sup>1</sup>

§ 824. The questions which usually arise with respect to admissions in pleading relate to their effect in the *same suit*; and here it may be laid down broadly, that "every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken *to be admitted*, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."<sup>2</sup> The proper understanding of this rule is the province of the pleader:<sup>3</sup> and in works on pleading a detailed explanation of its effects must be sought. It may, however, be here pointed out that the rule operates only with respect to *material* allegations. If, therefore, a statement of defence denies a particular fact alleged in the statement of claim, it does not thereby admit all the immaterial averments, which the pleader has chosen to introduce as part of the plaintiff's case.<sup>4</sup>

§ 825. Thus, where a declaration in *assumpsit*,—after stating that the defendants were *owners* of a vessel, on which the plaintiff caused to be shipped some potatoes to be carried by them, as *owners* of the vessel, to Liverpool; in consideration whereof, and of freight, they promised to carry the potatoes safely *as aforesaid*,—alleged as a breach, that through their negligence the goods were damaged: it was held, that the general issue did not admit that the defendants

<sup>1</sup> *Cooper v. Taylor*, 6 M. & Gr. 969.

<sup>2</sup> Rules of Sup. Ct., 1883, Ord. XIX., R. 13. But see, and attempt to reconcile, this Rule with R. 13 of Ord. XXVII., cited post, § 829.

<sup>3</sup> *Van Sandau v. Turner*, 6 Q. B. 785, per *Ld. Denman*.

<sup>4</sup> *Bingham v. Stanley*, 2 Q. B. 127; *Bennion v. Davison*, 3 M. & W. 179; *Dunford v. Trattles*, 12 M. & W. 534, per *Parke, B.*; *King v. Norman*, 4 Com. B. 884.

were owners, so as to raise the inference that the captain was their agent, the allegation of ownership being regarded as immaterial. The declaration in this case would have been equally good had no such allegation been made; since the statement, that, in consideration of the plaintiff having shipped the goods, and of the freight, the defendants promised to carry them safely, would have been quite sufficient, when coupled with an averment that the goods were not safely carried, to have made a complete case of liability against the defendants.<sup>1</sup>

§ 826. Next, the omitting to traverse a material allegation so § 753 far admits it, that the *party who thus pleads over cannot disprove it*. This accords with the old law, and therefore, where, in trover for bales of silk, the defendant pleaded that A. was factor of the plaintiffs, and as such, before and *at the time* of the pledge mentioned in the plea, was *intrusted by them with*, and *was in possession of*, dock-warrants relating to tho' bales; that he delivered the dock-warrants to the defendant, and pledged with him the bales, as security for a loan which the defendant then advanced to him on the faith of the said dock-warrants; and that the defendant had no notice that the factor was not the actual owner; it was held that the plaintiffs, by simply traversing the allegation that the defendant advanced the money on the faith of the dock-warrants, were debarred from proving that the dock-warrants were not deposited at the time of the advance, and were not, in fact, then in existence.<sup>2</sup>

§ 827. Under order XXXII, Rule 6, of the Rules of the Supreme Court, 1883, "any party may, at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as, upon such *admissions* he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such

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<sup>1</sup> *Bennion v. Davison*, 3 M. & W. 179, 182, 183, per Parke, B.; recognised by Alderson, B., in *Dunford v. Trattles*, 12 M. & W. 532. See, also, *Grew v. Hill*, 3 Ex. R. 801; 6 Dowl. & L. 664, S. C.

<sup>2</sup> *Bonzi v. Stewart*, 4 M. & Gr. 295. See, also, *Carter v. James*, 13 M. & W. 145, 146, text and note.

order, or give such judgment, as the court or judge may think fit." In accordance with this rule the Lords Justices have held, that where, in a partition action the defendants had by their statement of defence admitted the facts stated in the claim showing the plaintiff's title, the plaintiff had a right,—instead of having the action set down for hearing,—to an order on motion, directing the usual inquiries as to the persons interested in the property.<sup>1</sup> So, a plaintiff may move for judgment upon admissions, although he has joined issue on the defence, and given notice of trial.<sup>2</sup> So, in an action between partners,<sup>3</sup> and in one between principal and agent,<sup>4</sup> an order for an account and for the delivery of securities has been made on motion before the hearing, the judge acting solely on the admissions contained in the pleadings.<sup>5</sup> But in cases under this rule, as the judge has a discretion whether he will grant relief on motion or not, he will seldom be induced to take that step when any question of difficulty is raised; neither will the Court of Appeal, except in a clear case of error, interfere with the exercise of the judge's discretion.<sup>6</sup>

§ 828. Under the old rules of pleading, a demurrer used to be regarded by Courts of Equity as simply raising the question of law without any admission of the truth of the allegations contained in the bill; but in Courts of Law its operation was widely different; for there it was held to amount to an absolute admission of the facts stated in the paragraphs demurred to.<sup>7</sup> The New Rules of 1883 have rendered this discrepancy of no further importance, for they have cut the Gordian knot by abolishing demurrers altogether. The modern proceedings in lieu of demurrers are, in Order XXV. R. 2, thus explained:—"Any party shall be entitled to raise by

<sup>1</sup> *Gilbert v. Smith*, L. R., 2 Ch. D. 686; 45 L. J., Ch. 514, S. C.; *Hetherington v. Longrigg*, 48 L. J., Ch. 171, per Hall, V.-C.

<sup>2</sup> *Brown v. Pearson*, L. R., 21 Ch. D. 716, per Fry, J.

<sup>3</sup> *Turquand v. Wilson*, L. R., 1 Ch. D. 85; 45 L. J., Ch. 104, S. C.

<sup>4</sup> *Rumsey v. Reade*, L. R., 1 Ch. D. 463; 45 L. J., Ch. 489, S. C.

<sup>5</sup> See, also, *Jenkins v. Davies*, L. R., 1 Ch. D. 696; *In re Smith's estate*, *Bridson v. Smith*, 24 W. R., Ch. D. 392, per Hall, V.-C.; *In re Barker's Estate*, L. Q., 10 Ch. D. 162, per Hall, V.-C.

<sup>6</sup> *Mellor v. Sidebottom*, 46 L. J., Ch. 398; L. R., 5 Ch. D. 342, S. C.

<sup>7</sup> See *Metrop. Ry. Co. v. Defries*, L. R., 2 Q. B. D. 387, and Rules of 1875, Ord. XXVIII.



his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause, at or after the trial; provided that, by consent of parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing, and disposed of at any time before the trial.”<sup>1</sup>

§ 829. The Rules of the Supreme Court further provide, by Order XXVII, Rule 13, that “if the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be *deemed to have been denied* and put in issue.”<sup>2</sup>

§ 830. Irrespective of the new Rules of pleading, the Legislature has, in one somewhat remarkable case, provided, that the omission to plead a special defence shall operate as a conclusive presumption of liability. Allusion is here made to the Married Woman's Property Act, 1874,<sup>3</sup> which,—after enacting with respect to marriages that have taken place since the 30th July in that year, that husbands and wives may be jointly sued for debts incurred or torts committed by the wife before marriage, but that the husband shall be liable to the extent only of the assets therein specified,<sup>4</sup>—goes on to provide, that, if no plea denying liability be pleaded, “the husband shall be deemed to have confessed his liability so far as assets are concerned.”<sup>5</sup> Since the 1st January, 1883, the passage just cited is only operative with respect to parties married before that date.<sup>6</sup>

§ 831. It remains here to notice, in connexion with this subject, *the effect of paying money into court, and of tendering compensation.* § 760

<sup>1</sup> See also RR. 3, 4, and 5 of same Order. *Burstall v. Beyfus*, 53 L. J., Ch. 585, per Ct. of App.; L. R., 28 Ch. D. 35, S. C.

<sup>2</sup> This rule deserves special notice, as being directly opposed to the practice which prevailed under the Rules of 1875. See Ord. XXIX., R. 12, of those Rules. See, also, Ord. XIX., R. 13 of the Rules of 1883, cited ante, § 824.

<sup>3</sup> 37 & 38 V., c. 50.

<sup>4</sup> §§ 1, 2, and 5.

<sup>5</sup> § 2. See *Matthews v. Whittle*, L. R., 13 Ch. D. 811, per Jessel, M. R.; 49 L. J., Ch. 359, S. C.

<sup>6</sup> 45 & 46 V., c. 75, §§ 14, 15.

Payment of money into court,—which, (except in actions brought against magistrates,<sup>1</sup> and, perhaps, in one or two other suits,<sup>2</sup>) must, unless made before delivering a defence,<sup>3</sup> now be pleaded in all cases, but may be pleaded either to the whole or to part only of the plaintiff's claim,—may be made, as of course, in *any*<sup>4</sup> action which is brought to recover a debt or damages.<sup>5</sup> Amends may also be paid into court in some special actions under the provisions of particular statutes. For instance, in an action for a libel contained in any newspaper or other periodical publication, whether in England or Ireland, the defendant may plead that the language complained of was inserted without actual malice, and without gross negligence, and that at the earliest opportunity he had published, or, in some cases, had offered to publish, an ample apology. This statutable plea must then terminate with an allegation of the payment of money into court by way of amends, for otherwise the plaintiff may treat it as a mere nullity.<sup>6</sup> Many other statutes authorise the tender of amends and pleas of payment of money into court, when actions are brought against persons for acts done by them either in execution

<sup>1</sup> 11 & 12 V., c. 44, § 11, cited ante, § 315, n. 5.

<sup>2</sup> See ante, § 315, ad fin.

<sup>3</sup> Rules of Sup. Ct., 1883, Ord. XXII., R. 4, which points out the course of proceeding in that case.

<sup>4</sup> See *Hawksley v. Bradshaw*, 49 L. J., Q. B. 333, per Ct. of App.; L. R., 5 Q. B. D. 302, S. C.

<sup>5</sup> Rules of Sup. Ct., 1883, Ord. XXII., R. 1, provides, that "Where any action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time, by leave of the court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability, (except in actions or counterclaims for libel or slander), pay money into court" subject to special provisions. R. 2 provides that "Payment into court shall be signified in the defence, and the claim or cause of action, in satisfaction of which such payment is made, shall be specified therein." R. 4 regulates the practice where defendant pays money into court before delivering his defence; RR. 5 and 6 explain how the money is to be paid out of court, while R. 7—by imposing upon the plaintiff the duty of giving the defendant a special notice—exposes him to the risk of losing his costs in the event of his neglecting to comply with that Rule. See *Langridge v. Campbell*, L. R., 2 Ex. D. 281; 46 L. J., Ex. 277, S. C., as explained by *Buckton v. Higgs*, L. R., 4 Ex. D. 174. See, also, *Greaves v. Fleming*, L. R., 4 Q. B. D. 226; 48 L. J., Q. B. 335, S. C.

<sup>6</sup> See 6 & 7 V., c. 96, § 2, as amended by 42 & 43 V., c. 59; and 8 & 9 V., c. 75, § 2, as to Eng.; and 8 & 9 V., c. 75, §§ 1 and 2 as to Irel.

of their offices, or in pursuance or under the authority of Acts of Parliament;<sup>1</sup> and among these may be mentioned the Act passed in 1848 for the protection of justices,<sup>2</sup> the Acts of 1861, which consolidate the law relating to larceny, malicious injuries, and coin,<sup>3</sup> the Seamen's Clothing Act, 1869,<sup>4</sup> the Contagious Diseases, Animals, Act, 1878,<sup>5</sup> the Army Act, 1881,<sup>6</sup> and the Militia Act, 1882.<sup>7</sup>

§ 832. The salutary effect of these regulations was at one time much impaired by regarding payment of money into court as an *admission of the cause of action*. This mischievous doctrine is at length happily exploded; and, although such payment, when unaccompanied by any defence denying liability, is still "taken to admit the claim or cause of action in respect of which the payment is made," defendants may now in any cause, except in actions or counterclaims for libel or slander, plead payment of money into court together with any other pleas, either denying the plaintiff's right of action, or setting up some special defence.<sup>8</sup> The exception just cited would seem to have been aimed specially at the case of *Hawkesley v. Bradshaw*.<sup>9</sup> There, to an action for libel published in a newspaper, the defendant was allowed to plead, first, a justification on the ground that the libel was true, and next, an apology, together with a payment into court of 40s. by way of amends.

§ 838.<sup>10</sup> When judicial admissions,—by which are meant admissions entered into in the due course of legal proceedings,—have been *made through inadvertence or mistake*, the court, in its discretion, will relieve the party from the consequences of his error,

<sup>1</sup> See ante, §§ 311—315.

<sup>2</sup> 11 & 12 V., c. 44, § 11, cited ante, § 315, n. <sup>5</sup>.

<sup>3</sup> 24 & 25 V., c. 96, § 113; c. 97, § 71; c. 99, § 33.

<sup>4</sup> 32 & 33 V., c. 57, § 6.

<sup>5</sup> 41 & 42 V., c. 74, § 55, subs. 2.

<sup>6</sup> 44 & 45 V., c. 58, § 170, subs. 2.

<sup>7</sup> 45 & 46 V., c. 49, § 46, subs. 3.

<sup>8</sup> Rules of Sup. Ct., 1883, Ord. XXII., R. 1, cited, ante, § 831, n. <sup>5</sup>; *Berdan v. Greenwood*, L. R., 3 Ex. D. 251, per Ct. of App.; 47 L. J., Ex. 628, S. C.

<sup>9</sup> L. R., 5 Q. B. D. 302; per Ct. of App.; 49 L. J., Q. B. 333, S. C.

<sup>10</sup> Gr. Ev. § 206, nearly verbatim.

- by ordering a repleader, or by permitting an amendment, or by discharging the case stated, or the rule, or the agreement, if made in court.<sup>1</sup> Agreements, too, made out of court between solicitors, concerning the course of proceedings in court, are, in effect, equally under the court's control, by means of its coercive power over the solicitor in all matters relating to professional character and conduct. But, in all these cases, the party will be held to his admission, unless it *clearly* appear that he has acted through mistake.<sup>2</sup>

§ 839.<sup>3</sup> Every admission, which has been made with the intention of being acted upon, and which has been *acted upon by another person*, is conclusive against the party making it, in all cases between him and the individual whose conduct he has thus influenced. It is of no importance, whether such admission be made in express language to the person who acts upon it, or be implied from the general conduct of the party making it; for, in the latter case, the implied declaration will be considered as having been addressed to every one in particular, who may have had occasion to act upon it: and the rule of law is clear, that, where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.<sup>4</sup> Indeed, the principle may be laid down still more broadly, as precluding any party, who negligently or culpably stands by, and allows another to

<sup>1</sup> "Non fatetur, qui errat, nisi jus ignoravit." Dig. lib. 42, tit. 2, l. 2. "Si vero per errorem fuerit facta ipsa confessio (scil. ab advocatione), clienti concessum est, errore probato, usque ad sententiam revocare." 1 Masc. de Prob., quest. 7, n. 63; id. n. 19, 20, 21, 22; id. concl. 348, per tot.

<sup>2</sup> See *Pearse v. Grove*, 3 Atk. 523, per Ld. Hardwicke; Amb. 65, S. C. The Roman law was administered in the same spirit. "Si is, cum quo Lege Aquilia agitur, confessus est servum occidisse, licet non occiderit, si tamen occisus sit homo, ex confesso tenetur." Dig. lib. 42, tit. 2, l. 4; id. l. 6. See, also, Van Leeuw. Comm., B. V. ch. 21; Everh. Conc. 155, n. 3. "Confessus pro judicato est." Dig. lib. 42, tit. 2, l. 1.

<sup>3</sup> Gr. Ev. § 207, in part.

<sup>4</sup> Per Ld. Denman, in *Pickard v. Sears*, 6 A. & E. 474; recognised by Wood V.-C., in *Att.-Gen. v. Stephens*, 1 Kay & J. 748, 749.

contract on the faith and understanding of a fact which he can contradict, from disputing that fact in an action against the person, whom he has himself assisted in deceiving.<sup>1</sup> In such case the party is estopped, on the grounds of public policy and good faith, from repudiating his own representations.<sup>2</sup>

§ 840. In the case of *Freeman v. Cooke*,<sup>3</sup> Lord Wensleydale, § 770 while explaining this rule, pointedly observed:—"By the term 'wilfully,' we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representations to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth;<sup>4</sup> and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect;—as, for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorised."<sup>5</sup>

<sup>1</sup> Per *Ld. Denman*, in *Gregg v. Wells*, 10 A. & E. 98; recognised by *Parke, B.*, in *Harrison v. Wright*, 13 M. & W. 820.

<sup>2</sup> See ante, § 89, et seq.

<sup>3</sup> 2 Ex. R. 663; 6 Dowl. & L. 190, S. C.

<sup>4</sup> The rule, as here enunciated, was expressly adopted by the Court of Ex. in *Cornish v. Abington*, 4 H. & N. 549. See, too, *Sweeny v. Promoter Life Ass. Co.*, 14 Ir. Law R., N. S. 476, 486—492; *Thomas v. Brown*, L. R., 1 Q. B. D. 714; 45 L. J., Q. B. 811, S. C.; and *M'Kenzie v. British Linen Co.*, L. R., 6 App. Cas. 82, H. L. (Sc.).

<sup>5</sup> In *Howard v. Hudson*, 2 E. & B. 1, *Ld. Campbell* laid down a more restricted rule, observing:—"The party setting up such a bar to the reception of the truth must show, both that there was a *wilful* intent to make him act on the faith of the representation, and that he did so act;" and *Crompton, J.*, adds:—"The rule takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, not *malò animo*, but so far wilfully that the party making the representation on which the other acts *means* it to be acted upon in that way. That is the true criterion." See further on this subject, *Foster v. Mentor Life Ass. Co.*, 3 E. & B. 48.

§ 841. Again, if a party having a secret equity, chooses to stand by, and permit the apparent owner to deal with others as if he were the absolute owner, he shall not be permitted to assert such secret equity against a title founded on such apparent ownership.<sup>1</sup> Many decisions have been founded upon this principle, but the case of the Duke of Beaufort v. Neald<sup>2</sup> will sufficiently serve to illustrate it. There, the Duke had signed, and put into the hands of his agent, an authority to consent to any exchanges under an Inclosure Act, but had directed him not to act upon this authority excepting under certain circumstances. The agent, in breach of his private instructions, having produced the authority and agreed to an exchange not under the stipulated circumstances, the Duke repudiated the agreement, but the House of Lords held that he was clearly bound thereby. The Courts have also acted upon this doctrine on several occasions, where negotiations have been entered into preparatory to marriage; and the abstract rule deducible from the authorities is, that, whenever a representation<sup>3</sup> of some *fact*,—as contradistinguished from a mere representation of *intention*<sup>4</sup>,—has been made by one party for the purpose of influencing the conduct of another, and has been acted upon by the latter, this will, in general, be sufficient to entitle him to the assistance of the court for the purpose of realising such representation.<sup>5</sup>

<sup>1</sup> *Mangles v. Dixon*, 1 M. & Gord. 446, per Ld. Cottenham; 1 Hall & T 550, S. C. See, also, *Att.-Gen. v. Naylor*, 33 L. J., Ch. 151, per Wood, V.-C.; *Ramsden v. Dyson*, 1 Law Rep., H. L. 129; *Rolt v. White*, 3 De Gex, J. & S. 360, 365, per Ld. Westbury.

<sup>2</sup> 12 Cl. & Fin. 249. See *Graham v. Birkenhead Ry. Co.*, 2 M. & Gord. 146; 2 Hall & T. 450, S. C.; *Kent v. Jackson*, 14 Beav. 384, per Romilly, M. R.; *Trickett v. Tomlinson*, 13 Com. B., N. S. 663; *Pole v. Leask*, 33 L. J., Ch. 155, per Dom. Proc.

<sup>3</sup> Ld. Cranworth is said to have held that the rule does not apply unless there be *misrepresentation*. Sed qu. See *Money v. Jorden*, 15 Beav. 372, 387, n.; *Pulsford v. Richards*, 17 Beav. 94, 95.

<sup>4</sup> *Jordan v. Money*, 5 H. of L., Cas. 185, per Ld. Cranworth, C., and Ld. Brougham, in Dom. Proc., Ld. St. Leonards diss., overruling a decision of Romilly, M. R., in *Money v. Jorden*, 15 Beav. 372. See *Maddison v. Alderson*, L. R., 8 App. Cas. 467, per Dom. Proc.; 52 L. J., Q. B. 737, S. C.; affirm. S. C., per Ct. of App.; 50 L. J., Q. B. 466; and L. R., 7 Q. B. D. 174; and overruling S. C., nom. *Alderson v. Maddison*, L. R., 5 Ex. D. 293; and 49 L. J., Ex. 501, per Stephen, J.; and questioning *Loffus v. Maw*, 3 Giff. 592, 604, per Stuart, V.-C. See, also, post, § 1043.

<sup>5</sup> *Hammersley v. Baron de Biel*, 12 Cl. & Fin. 45, 62, n., per Ld. Cottenham (3588)

§ 842.<sup>1</sup> The same rule is familiarly illustrated by the case of a man cohabiting with a mistress, and treating her in the face of the world as his wife. Here, though he thereby acquires no rights against others, they possibly may do so against him. For instance, if the woman during such cohabitation be supplied with goods ostensibly for the use of the joint household, and the reputed husband be sued for their price, he will not be permitted to disprove the marriage, but the jury will be justified, as in the case of a real wife, in dealing with the question as one of ordinary domestic agency.<sup>2</sup> It must not, however, here be forgotten, that the old doctrine of presumptive agency, as applicable to the relationship of husbands and wives, has been recently encroached upon to an undefined extent, if not actually set aside, by "The Married Women's Property Act, 1882,"<sup>3</sup> which in § 1, subs. 3, enacts, that every contract entered into, since the 1st of January, 1883, "by a married woman, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, *unless the contrary be shown.*"

§ 843.<sup>4</sup> Where a person knowingly permits his name to be used as one of the partners in a trading firm, or an existing joint-stock company, under such circumstance of publicity as to satisfy the jury that a stranger knew of it, and believed him to be a partner,

ham; 88, per *Ld. Campbell*; *Neville v. Wilkinson*, 1 Br. C. C. 543; *Montefiori v. Montefiori*, 1 W. Bl. 363; *Bentley v. Mackay*, 31 Beav. 155, per *Romilly, M. R.*; *Laver v. Fielder*, 32 L. J., Ch. 365, per *Romilly, M. R.*; 32 Beav. 1, S. C.; *Gale v. Lindo*, 1 Vern. 475; *Jorden v. Money*, 5 H. of L. Cas. 185; *Money v. Jorden*, 15 Beav. 372; *Hutton v. Rossiter*, 7 De Gex, M. & G. 9; *Pulsford v. Richards*, 17 Beav. 87, 94, per *Romilly, M. R.*; *Yeomans v. Williams*, 1 Law Rep., Eq. 184; *Hodgson v. Hutchinson*, 5 Vin. Abr. 522, *Cookes v. Mascall*, 2 Vern. 200; *Wankford v. Fotherley*, id. 322; *Luders v. Anstey*, 4 Ves. 501; *Middleton v. Pollock*, Ex p. *Wetherall*, L. R., 4 Ch. D. 49; 46 L. J., Ch. 39, S. C. See *Wright v. Snowe*, 2 De Gex & Sm. 321; *Maunsell v. White*, 4 H. of L. Cas. 1039; *Bold v. Hutchinson*, 24 L. J., Ch. 285, per *Romilly, M. R.*; 23 Beav. 250, S. C.; 5 De Gex, M. & G. 558, S. C., on appeal; *Trail v. Baring*, 33 L. J., Ch. 521; 4 Giff. 485, S. C.

<sup>1</sup> Gr. Ev. § 207, in part, as to first 7 lines.

<sup>2</sup> *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; *Munro v. De Chemant*, 4 Camp. 215. See ante, § 192. Also, *Mace v. Cadell*, 1 Cowp. 233, recognised in *Batthews v. Galindo*, 4 Bing. 613.

<sup>3</sup> 45 & 46 V., c. 75. See *Myles v. Burton*, 14 L. R. Ir. 258.

<sup>4</sup> Gr. Ev. 207, in part.

he is liable to such stranger in all transactions, in which the latter engaged and gave credit upon the faith of his being such partner.<sup>1</sup> So, although the mere fact of a person agreeing to become a member of the *provisional committee* of an intended railway company, or even the fact of such person authorising his name to be published in a prospectus, which contains nothing more than the names of the provisional committee-men, will not render him liable for contracts made by the other members or by the solicitor, for the purpose of promoting the objects in view ; because such an intended association does not amount to a partnership, as it constitutes no agreement to share in profit and loss ;<sup>2</sup>—still, if evidence be forthcoming that such person has *acted* with relation to the proposed scheme, as by attending meetings, giving directions, and the like, it will be for the jury to determine<sup>3</sup> whether he has not thereby authorised the managing committee, or the other members of the provisional committee, or the solicitor or secretary of the intended company, to pledge his credit for the necessary and ordinary expenses to be incurred in forming the company ; and if they decide this question in the affirmative, they may then give a verdict against him, on further finding that the work was done, and the credit given, on the faith of his being liable.<sup>4</sup>

§ 844. On the same principle, if a man, by holding out false colours, induces a railway company to register him as a proprietor of shares, and, subsequently, to bring an action against him for calls on such shares, he will be precluded from disputing the validity

<sup>1</sup> Per Parke, J., in *Dickinson v. Valpy*, 10 B. & C. 128, 140, 141 ; 5 M. & R. 126, S. C. ; *Wood v. D. of Argyll*, 6 M. & Gr. 932, per Cresswell, J. ; *Harrison v. Heathorn*, 6 M. & Gr. 81, 133, 134, per Tindal, C. J. ; *Fox v. Clifton*, 6 Bing. 776, 794, per Tindal, C. J. See, also, *Kell v. Nainby*, 10 B. & C. 20 ; *Guidon v. Robson*, 2 Camp. 302, per Ld. Ellenborough.

<sup>2</sup> *Reynell v. Lewis*, & *Wyld v. Hopkins*, 15 M. & W. 517. See *Ex parte Cottle*, 2 M. & Gord. 185 ; 2 Hall & T. 382, S. C. ; *Ex parte Roberts*, 2 M. & Gord. 192 ; 2 Hall & T. 391, S. C. ; *Norris v. Cottle*, 2 H. of L. Cas. 647 ; *Hutton v. Upfill*, id. 674 ; *Bright v. Hutton*, & *Hutton v. Bright*, 3 H. of L. Cas. 341 ; *M'Ewan v. Campbell*, 2 Macq. Sc. Cas. H. of L. 499.

<sup>3</sup> *Williams v. Pigott*, 2 Ex. R. 201 ; *Bright v. Hutton*, & *Hutton v. Bright*, 3 H. of L. Cas. 341.

<sup>4</sup> *Reynell v. Lewis*, & *Wyld v. Hopkins*, 15 M. & W. 517 ; *Lake v. D. of Argyll*, 6 Q. B. 477. See *Higgins v. Hopkins*, 3 Ex. R. 163 ; *Burnside v. Dayrell*, id. 224 ; *Bailey v. Macaulay*, 13 Q. B. 815 ; *Rennie v. Clarke*, 5 Ex. R. 292 ; *Rennie v. Wynn*, 4 Ex. R. 691 ; *Ex parte Besley*, 2 M. & Gord. 176.



of the transfer to him, or from otherwise denying his character as a shareholder.<sup>1</sup> So, when a company had registered a person as a shareholder, and had induced him, on the faith of such registration, to pay a call, they were not allowed to dispute his title to the shares.<sup>2</sup> An infant, too, who has actually deceived a tradesman by fraudulently representing himself to be of full age, and who has thus obtained credit for goods supplied to him, will be held bound by his statement,<sup>3</sup> and liable to pay the debt. So, also, a person who has assumed to act as a broker of the city of London, cannot, as against a party who has employed him, protect himself from a discovery of his dealings with such party, on the ground that his answer may expose him to penalties for having acted as a broker without being duly qualified.<sup>4</sup>

§ 845. Where parties have agreed to act upon an assumed state of facts, their rights between themselves will be made to depend on such assumption, and not upon the truth.<sup>5</sup> Again, if a party has taken advantage of, or voluntarily acted under, the bankrupt or insolvent laws, he shall not be permitted, as against parties to the proceedings, to deny their regularity.<sup>6</sup> So, the grantee of an

<sup>1</sup> *Sheffield & Manch. Ry. Co. v. Woodcock*, 7 M. & W. 574, 582, 583; *Cheltenham & Gt. West. Union Ry. Co. v. Daniel*, 2 Q. B. 281, 292; In re North of Eng. Jt. St. Bk. Co., Ex parte Straffon's Exors., 22 L. J., Ch. 194, 202, 203; *Taylor v. Hughes*, 2 Jones & Lat. 24. See *Swan v. North Brit. Austral. Co.*, 7 H. & N. 603; S. C. in Ex. Ch., 2 New R. 521; 2 H. & C. 175; and 32 L. J., Ex. 273.

<sup>2</sup> *Hart v. Frontino, &c., Gold Mining Co.*, 5 Law Rep., Ex. 111; 39 L. J., Ex. 93, S. C.; *Re Bahia & Francisco Ry. Co. v. Tritten*, 37 L. J., Q. B., 137; 3 Law Rep., Q. B. 584; 9 B. & S. 844, S. C. See, also, *Webb v. Herne Bay Improving Com.*, 39 L. J., Q. B. 221; 5 Law Rep., Q. B. 642, S. C.; and *Simm v. Anglo-Amer. Teleg. Co.*, 49 L. J., Ch. 392, per Ct. of App.

<sup>3</sup> Ex parte *Unity Jt. St. Mutual Bank. Associat.*, In re *King*, 3 De Gex & J. 63; *Nelson v. Stocker*, 28 L. J., Ch. 760; 4 De Gex & J. 458, S. C. The old common law rule, as recognised in the following cases, is no longer law. *Price v. Hewett*, 8 Ex. R. 146; *Liverpool Adelphi Loan Associat. v. Fairhurst*, 9 Ex. R. 423, 430; *Bartlett v. Wells*, 31 L. J., Q. B. 57; 1 B. & S. 836, S. C.; *De Roo v. Foster*, 12 Com. B. N. S. 272.

<sup>4</sup> *Robinson v. Kitchin*, 21 Beav. 365; 8 De Gex, M. & G. 88 S. C.; 25 L. J., Ch. 441, S. C.; *Green v. Weaver*, 1 Sim. 404. See 33 & 34 V., c. 60.

<sup>5</sup> *M'Cance v. Lond. & N. W. Ry. Co.*, 34 L. J., Ex. 39; 3 H. & C. 343, S. C.

<sup>6</sup> *Like v. Howe*, 6 Esp. 20; *Clarke v. Clarke*, id. 61; *Gouldie v. Gunston*, 4 Camp. 381; *Watson v. Wace*, 5 B. & C. 153, explained in *Heane v. Rogers*, 9 B. & C. 586, 587; *Mercer v. Wise*, 3 Esp. 219; *Harmar v. Davis*, 7 Taunt. 577; *Flower v. Herbert*, 2 Ves. Sen. 326. See ante, §§ 817, 818.

annuity, whose duty it was, under an Act now repealed,<sup>1</sup> to have the memorial properly enrolled, was not allowed to take advantage of his own neglect, and set up the want of enrolment against the grantor, although the statute declared that in case of non-enrolment annuity deeds should be void.<sup>2</sup> So, if an agent or a workman knowingly renders an untrue account to his principal or employer, and such account is adopted by the party to whom it is given, it cannot afterwards be gainsaid by the person who rendered it.<sup>3</sup> So, if a man by his receipt acknowledges that he has received money from an agent on account of his principal, and thereby accredits the agent with the principal to that amount, such receipt is conclusive as to payment by the agent.<sup>4</sup> Therefore, the usual acknowledgment in a policy of insurance of the receipt of premium from the assured is conclusive of the fact as between the underwriters and the assured, although not as between the underwriters and the broker.<sup>5</sup> So, if a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right;<sup>6</sup> and precisely the same doctrine applies to personal property.<sup>7</sup> So, if the owner of an instrument which purports to be transferable by delivery, deposits it with his broker or banker, he will be estopped, as against a bona fide holder for value, from denying that it was transferable.<sup>8</sup>

§ 846. Trespass, also, is not maintainable against a sheriff's officer who executes process against a man by a wrong name, either

<sup>1</sup> 53 G. 3, c. 141, repealed by 17 & 18 V., c. 90.

<sup>2</sup> *Molton v. Camroux*, 2 Ex. R. 487; aff. in Ex. Ch., 4 Ex. R. 17.

<sup>3</sup> *Cave v. Mills*, 31 L. J., Ex. 265; 7 H. & N. 913, S. C.; *Skyring v. Greenwood*, 4 B. & C. 281; *Shaw v. Picton*, id. 715.

<sup>4</sup> 3 St. Ev. 956. See *Rice v. Rice*, 2 Drew. 73; *Hunter v. Walters*, 11 Law Rep., Eq. 292.

<sup>5</sup> 3 St. Ev. 956; *Dalzell v. Mair*, 1 Camp. 532, per Ld. Ellenborough; *De Gaminde v. Pigou*, 4 Taunt. 246; *Anderson v. Thornton*, 8 Ex. R. 428, per Parke, B.

<sup>6</sup> 3 Sug. V. & P. 428, 10th ed.; and id. 611, 13th ed.; recognised by the court in *Sandys v. Hodgson*, 10 A. & E. 476. See, also, *Ramsden v. Dyson*, 1 Law Rep., H. L. 129; and *Doe v. Groves*, 10 Q. B. 486. *Dixon v. Mucklestone*, L. R., 8 Ch. App. 155; *In re Lambert's estate*, 13 L. R. Ir. 234, per Ct. of App.

<sup>7</sup> *Pickard v. Sears*, 6 A. & E. 469; *Gregg v. Wells*, 10 A. & E. 90; 2 P. & D. 296, S. C.; *Coles v. Bk. of England*, 10 A. & E. 437; 2 P. & D. 521, S. C.

<sup>8</sup> *Goodwin v. Roberts*, L. R., 1 App. Cas. 476; 10 Ex. D. 76, 337, S. C.; *Rumball v. Metrop. Bk.*, L. R., 2 Ex. D. 194; 46 L. J., Q. B. 346, S. C.

by taking his person, or seizing his goods, if before the process be sued out, he is asked his name, and gives such wrong one;<sup>1</sup> and if a party, who has entered into a bond by a wrong name, is sued in that name, he cannot, as it seems, cause the statement of claim to be amended at the cost of the plaintiff,<sup>2</sup> and probably he would be estopped from denying that the name in which he was sued was his real name.<sup>3</sup> Again, in the case of a compulsory reference under the Common Law Procedure Act, 1854, when the award was not made within three months,<sup>4</sup> but both parties had, after the lapse of that period, continued to attend before the arbitrator without raising any objection to his jurisdiction, it was held that the losing party was estopped from alleging that the time had not been enlarged, either by the court, or by the written consent of the parties.<sup>5</sup> On the same principle, where a judge had tried a cause without the intervention of a jury, both parties assenting to his jurisdiction, and appearing before him, the unsuccessful party was not allowed afterwards to object, that no written consent had been drawn up in accordance with the requirements of the statute then in force.<sup>6</sup>

§ 847. If the members of an incorporated company allow a solicitor to appear for them as defendants, and he consents to a reference, they cannot, after the award is made, object to the submission, § 775

<sup>1</sup> As to a ca. sa., see *Morgans v. Bridges*, 1 B. & A. 650, 651, and *Magnay v. Fisher*, 5 M. & Gr. 778, 787; 6 Scott N. R. 588, S. C. These cases appear to overrule *Coote v. Leighworth*, M. 557, and a dictum of Ld. Hale in *Thurbane et al., Hardr.* 323; but see *Freeman v. Cooke*, 18 L. J., Ex. 115, where Parke, B., intimated that it had always been the opinion of the profession that *Coote v. Leighworth* was law. See, also, *Dunston v. Paterson*, 26 L. J., C. P. 267; 2 Com. B., N. S. 495, S. C.; *Kelly v. Lawrence*, 33 L. J., Ex. 197; 3 H. & C. 1, S. C. As to a fi. fa., see *Price v. Harwood*, 3 Camp. 108, per Ld. Ellenborough; cited and recognised by Cresswell, J., in *Fisher v. Magnay*, 5 M. & Gr. 787. See, also, *Reeves v. Slater*, 7 B. & C. 486.

<sup>2</sup> *Hyckman v. Shotbolt*, 3 Dyer, 279, b., cited 5 M. & Gr. 788, n. See 3 & 4 W. 4, c. 42, § 11.

<sup>3</sup> *R. v. Wooldale*, 6 Q. B. 566, per Wightman, J., citing *Maby v. Shepherd*, Cro. Jac. 640, and *Hyckman v. Shotbolt*, 3 Dyer 279, b. See, also, *Williams v. Bryant*, 5 M. & W. 447.

<sup>4</sup> See *Baker v. Stephens*, 8 B. & S. 438.

<sup>5</sup> *Tyerman v. Smith*, 25 L. J., Q. B. 359; 6 E. & B. 719, S. C.; 17 & 18 V., c. 125, §§ 3 & 15. See, also, *Haines v. E. India Co.*, 6 Moo. Ind. App. Cas. 467, 484, 485, per Sir J. Patteson; 11 Moo. P. C. R. 39, 57, S. C.

<sup>6</sup> *Andrews v. Elliott*, 5 E. & B. 502; S. C., 6 E. & B. 338, per Ex. Ch.; 17 & 18 V., c. 125, § 1.

on the ground that the solicitor had no authority under seal to defend or refer the cause.<sup>1</sup> Where, too, the order of a judge was bad as a proceeding under an Interpleader Act,<sup>2</sup> now repealed, for want of a statement of consent upon its face, it was nevertheless held to be conclusive upon the parties, who by their conduct had agreed to submit the matter in dispute to the decision of the judge.<sup>3</sup> So, although a breach of covenant can in no case be justified by a parol licence to break it,<sup>4</sup> a forfeiture occasioned by it may be sometimes waived or rendered nugatory by the conduct of the covenantee. Thus, where a lessor, after giving notice to his lessee to do repairs within the period prescribed by the lease, so conducted himself as to lull the lessee asleep and to lead him to suppose that he might refrain from doing the repairs, the court would not allow the lessor to insist upon a covenant of forfeiture, on the ground that the repairs had not been finished within the time fixed for them.<sup>5</sup> So, where a covenant to insure on the tenant's part was qualified by an option given to the landlord to insure if the tenant made default, and to add the premiums to his rent; it was held, in ejectment for a forfeiture for not insuring, that the defendant might defeat the action, by proving that the landlord had represented to him that he had exercised the power, and had himself duly insured the premises.<sup>6</sup> So, also, a tenant, who had paid rent, and acted as such, was not permitted,—as stated more fully in another place,<sup>7</sup>—to set up a superior title of a third person against his lessor, in bar of an ejectment brought by him; for since he derived possession from him as tenant, he was not allowed to repudiate that relation.

§ 848. This doctrine is also applied to the respective relations of licensor and licensee, bailor and bailee, and principal and agent; the rule of law being clear that neither licensees, nor bailees, nor

<sup>1</sup> *Faviell v. East. Cos. Ry. Co.*, 2 Ex. R. 344; 6 Dowl. & L. 54, S. C.

<sup>2</sup> 1 & 2 W. 4, c. 58.

<sup>3</sup> *Harrison v. Wright*, 13 M. & W. 816.

<sup>4</sup> *Doe v. Gladwin*, 6 Q. B. 953, 962; *West v. Blakeway*, 2 M. & Gr. 729.

<sup>5</sup> *Hughes v. Metrop. Ry. Co.*, 45 L. J., C. P. 578, per Ct. of App.; S. C. aff. in Dom. Proc. L. R., 2 App. Cas. 439; and 46 L. J., C. P. 583.

<sup>6</sup> *Doe v. Sutton*, 9 C. & P. 706; explained by Patteson, J., in *Doe v. Gladwin*, 6 Q. B. 962, 963; *Doe v. Rowe*, Ry. & M. 343; 2 C. & P. 246, S. C. See ante, §§ 804—808.

<sup>7</sup> Ante, §§ 101—103.

agents, can be permitted to dispute the respective titles of their licensors, bailors, or principals.<sup>1</sup> A licensee, therefore, under a patentee is estopped from disputing the validity of the patent, so long as the licence continues in force.<sup>2</sup> So, if a warehouseman, wharfinger, banker, solicitor, agent, or other depositary of goods or moneys, has once acknowledged the title of a person as his bailor or principal, and has agreed to hold the goods or moneys subject to his order, or to sell the goods and to account for the proceeds, he will be estopped from setting up the title of a third person to the same goods or moneys, or from otherwise defeating the rights of his bailor or principal, against his own manifest obligations to him.<sup>3</sup> An exception, however, will be allowed, where the bailment has been determined by what is equivalent to an eviction by title paramount,<sup>4</sup> and, also, where the bailor or principal has obtained the goods fraudulently or tortiously from the third person,<sup>5</sup> provided the defendant in such last case can show, that he was unacquainted with the circumstances when he made the admission,<sup>6</sup> and that such third person has actually made a claim to the goods or moneys in question.<sup>7</sup> Perhaps the bailor's title might also be impugned,

<sup>1</sup> *Dixon v. Hamond*, 2 B. & A. 310, 313, per Abbott, C. J.; *Collett v. Hubbard*, 2 Coop. 94, 99; *Zulueta v. Vinnent*, 1 De Gex, M. & G. 315, Story, Agen. § 217; *Phillips v. Hall*, 8 Wend. 610; *Drown v. Smith*, 3 New Hamp. 299; *Eastman v. Tuttle*, 1 Cowen, 248; *M'Neil v. Philip*, 1 M'C. 392; *Chapman v. Searle*, 3 Pick. 38, 44; *Jewett v. Torrey*, 11 Mass. 219; *Lyman v. Lyman*, id. 317; Story, Bail. § 102.

<sup>2</sup> *Crossley v. Dixon*, 32 L. J., Ch. 617, per Dom. Proc.; 10 H. of L. Cas. 293, S. C.; *Clark v. Adie*, L. R., 2 App. Cas. 423; 46 L. J., Ch. 598, S. C., per Dom. Proc.

<sup>3</sup> *Gosling v. Birnie*, 7 Bing. 339; 5 M. & P. 160, S. C.; *Woodley v. Coventry*, 32 L. J., Ex. 185; 2 H. & C. 164, S. C.; *Stonard v. Dunkin*, 2 Camp. 344, per Ld. Ellenborough; *Harman v. Anderson*, id. 243, per id.; *Knights v. Wiffen*, 5 Law Rep., Q. B. 660; *Hawes v. Watson*, 2 B. & C. 540; 4 D. & R. 22, S. C.; *Dixon v. Hamond*, 2 B. & A. 310; *Roberts v. Ogilby*, 9 Price, 269; anon. per Gould, J., cited 3 Esp. 115, and there recognised by Ld. Kenyon; *Farringdon v. Clerk*, 3 Doug. 124; 2 Chit. R. 429, S. C.; *Holl v. Griffin*, 10 Bing. 246; 3 Moore, 732, S. C.; *Nickolson v. Knowles*, 5 Madd. 47; *Evans v. Nichol*, 3 M. & Gr. 614. See, however, *Thorne v. Tilbury*, 27 L. J., Ex. 407; 3 H. & N. 534, S. C.

<sup>4</sup> *Biddle v. Bond*, 34 L. J., Q. B. 137; 6 B. & S. 225, S. C.

<sup>5</sup> *Hardman v. Wilcock*, 9 Bing. 382, n.; *Biddle v. Bond*, 34 L. J., Q. B. 137; 6 B. & S. 225, S. C.

<sup>6</sup> Per Alderson, J., in *Gosling v. Birnie*, 7 Bing. 346; Ex p. Davies, re Saddle, L. R., 19 Ch. D. 86.

<sup>7</sup> *Betteley v. Reid*, 4 Q. B. 511, 517, 518.

should the circumstances be such as to show that he, in connexion with some third person, had practised a fraud on the bailee, by representing goods to belong to the bailor, which, in fact, were the property of such third person, if in this case additional proof were given, that the defendant, in consequence of the fraudulent misrepresentation, had sustained any real injury.<sup>1</sup>

§ 849. It seems also that, where a person pledges property to which he has no title, the pledgee is not estopped from delivering it to the rightful owner; for in the ordinary case of a pledge, the pledgor impliedly undertakes that the property is his own, and the pledgee merely undertakes that he will return it to the pledgor, provided it be not shown to belong to another.<sup>2</sup> A common carrier, too, being bound to receive goods for carriage, and having no means of making inquiry as to their ownership, is at liberty to dispute the title of the person from whom he has received them; and if he be sued in trover by such person, he may establish his defence by proving that he has delivered the goods to the real owner on his claiming them.<sup>3</sup> A vendor, however, who has sold goods to a party as a sole purchaser, and has directed his factors to weigh them over to such party, and to enter them in his name in their books, cannot, after such sale and transfer, dispute his title as sole proprietor, or detain the goods, on the authority of a third person, who claims to be a joint purchaser.<sup>4</sup> § 766

§ 850. Again, in an action against the acceptor of a bill, the defendant cannot show that his signature has been forged, if he has accredited the bill, and induced the plaintiff to take it, by saying that the acceptance was his, and that the bill would be duly paid.<sup>5</sup> At one time, however, it was deemed law, that no consideration of estoppel as between the parties could have any weight where the rights of the *revenue* intervened; and, consequently, the maker of a § 77

<sup>1</sup> *Scott v. Crawford*, 4 M. & Gr. 1031.

<sup>2</sup> *Cheesman v. Exall*, 6 Ex. R. 341.

<sup>3</sup> *Sheridan v. The New Quay Co.*, 28 L. J., C. P. 58; 4 Com. B., N. S. 618, S. C.

<sup>4</sup> *Kieran v. Sandars*, 6 A. & E. 515.

<sup>5</sup> *Leach v. Buchanan*, 4 Esp. 226 per *Ld. Ellenborough*; recognised by *Erskine, J.*, in *Sanderson v. Collman*, 4 M. & Gr. 222.

banker's cheque provided it were payable to *bearer* on demand,<sup>1</sup> might have defrauded a bona fide holder for value, by proving that the cheque was post-dated, and, as such, inadmissible in evidence without a bill stamp.<sup>2</sup> But this doctrine,—which certainly savoured of cruel injustice,—has been repudiated by the Court of Exchequer;<sup>3</sup> and it seems now to be the law, that if a cheque,—whether payable to bearer or to order,—appears, when tendered in evidence, to bear on its face a sufficient stamp, the court will receive the document, and will not allow any proof to be given that it had actually been post-dated, and that the holder had taken it with knowledge of that fact.<sup>4</sup>

§ 851. The *acceptance* of a bill of exchange is also deemed a *conclusive admission*,<sup>5</sup> as against the acceptor, of the signature of the drawer,<sup>6</sup> of his capacity to draw;<sup>7</sup> and if the bill be payable to the order of the drawer, of his capacity to indorse;<sup>8</sup> and if it be drawn by procuration, of the authority of the agent to draw in the name of the principal;<sup>9</sup> and it matters not in this respect, whether

<sup>1</sup> Whistler v. Forster, 32 L. J., C. P. 161; 14 Com. B., N. S. 248, S. C.; Austin v. Bunyard, 4 Fost and Fin. 253, per Cockburn, C. J.; Bull v. O'Sullivan, 6 Law Rep., Q. B. 209; 40 L. J., Q. B. 141, S. C.

<sup>2</sup> Field v. Woods, 7 A. & E. 114; 2 N. & P. 117, S. C.; recognised in Steadman v. Duhamel, 1 Com. B. 892, 893.

<sup>3</sup> Austin v. Bunyard, 34 L. J., Q. B. 217; 6 B. & S. 687, S. C.

<sup>4</sup> Gatty v. Fry, L. R., 2 Ex. D. 265; 46 L. J., Ex. 605, S. C.; Emanuel v. Roberts, 6 B. & S. 687; 34 L. J., Q. B. 217, S. C.

<sup>5</sup> See 45 & 46 V., c. 61, § 54.

<sup>6</sup> Sanderson v. Collman, 4 M. & Gr. 209; 4 Scott, N. R. 638, S. C.; Bass v. Clive, 4 M. & Sel. 13.

<sup>7</sup> Id. See Haly v. Lane, 2 Atk. 182, per Ld. Hardwicke.

<sup>8</sup> Taylor v. Croker, 4 Esp. 187, per Ld. Ellenborough; Pitt v. Chappelow, 8 M. & W. 616; Drayton v. Dale, 2 B. & C. 293; 3 D. & R. 534, S. C. All these cases were recognised by the court in Sanderson v. Collman, 4 M. & Gr. 218, 219, 224. See, also, Braithwaite v. Gardner, 8 Q. B. 473, where, in an action by the indorsee against the acceptor of a bill, the defendant was held to be estopped from pleading that the drawer and first indorser was an uncertificated bankrupt when the acceptance was given, and that his assignees had demanded payment. So, in a similar action, it was held, that the defendant could not plead under the old law, that the drawer and first indorser was a married woman from the date of the drawing down to the time of the indorsing of the bill. Smith v. Marsack, 6 Com. B. 486; 6 Dowl. & L. 363, S. C. See ante, § 842.

<sup>9</sup> Robinson v. Yarrow, 7 Taunt. 455; Jones v. Turnour, 4 C. & P. 204, per Ld. Tenterden.

the bill be drawn before or after the acceptance.<sup>1</sup> The law, however, in general, recognises no such admission on the part of the acceptor, either of the signature of the payee, though he be the same party as the drawer,<sup>2</sup> or of that of any other indorser;<sup>3</sup> and this, too, although, at the time of the acceptance, the indorsements were on the bill.<sup>4</sup> Neither does the acceptance admit, that an agent, who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same;<sup>5</sup> nor is the acceptor of a bill, which a partner has drawn in the partnership name and made payable to the firm's order, estopped from showing that in fact it was not indorsed by the firm or negotiated for any partnership purpose.<sup>6</sup> So, if on a bill payable to the order of the drawer the name of a *real* person as drawer and indorser be *forged*, it seems that the mere acceptance of such bill, in *ignorance* of the forgery, will not preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawing which he is bound to admit;<sup>7</sup> but if the acceptor, with *knowledge* of the forgery, puts the bill in circulation, he will be estopped from disputing the validity of the indorsement equally with that of the drawing.<sup>8</sup> In this last event the case is considered to fall within the principle of *Cooper v. Meyer*, which decides that if the bill be drawn in a wholly *fictional* name, and the handwriting of the indorsement be the same as that of the drawing, the acceptor will be estopped from denying it, because he admits that the bill is drawn by *somebody*, that is, by the person who indorses in the same handwriting, and the fair construction to be put on his undertaking is, that he will pay to the signature of the same person who signed for the drawer.<sup>9</sup>

<sup>1</sup> *Schultz v. Astley*, 2 Bing. N. C. 544, 552, 553; 2 Scott, 815, S. C.; *Hallifax v. Lyle*, 3 Ex. R. 446; *Lond. & S. West. Bk. v. Wentworth*, L. R., 5 Ex. D. 96. But see *Baxendale v. Bennett*, L. R., 3 Q. B. D. 525, per Ct. of App.; 47 L. J., Q. B. 625, S. C.

<sup>2</sup> *Forster v. Clements*, 2 Camp. 17; *Macferson v. Thoytes*, Pea. R. 20; *Bosanquet v. Anderson*, 6 Esp. 44, per Ld. Ellenborough; *Cooper v. Meyer*, 10 B. & C. 471, per Ld. Tenterden.

<sup>3</sup> *Id.*  
<sup>4</sup> *Smith v. Chester*, 1 T. R. 654; *Roberts v. Tucker*, 16 Q. B. 560.

<sup>5</sup> *Robinson v. Yarrow*, 7 Taunt. 455; recognised in *Beeman v. Duck*, 11 M. & W. 255.

<sup>6</sup> *Garland v. Jacomb*, 8 Law Rep., Ex. 216, per Ex. Ch.

<sup>7</sup> *Beeman v. Duck*, 11 M. & W. 251, 255.

<sup>8</sup> *Id.*

<sup>9</sup> *Cooper v. Meyer*, 10 B. & C. 468, 471, per Ld. Tenterden; 5 M. & R. 397, (3598)



§ 852. The reasons for this distinction between the case of a drawer and that of an indorser, who signs the bill before the acceptance, are not very clear; but those usually assigned are, that, as the acceptor is only presumed to be acquainted with the handwriting of the drawer, it is sufficient if he ascertains that his signature is genuine; that he is not bound to look at the back of the bill at all; that, even if he were, he could not be supposed to know the handwriting of indorsers, who would probably be strangers to him; and that a different rule would raise nice questions of fact in every case, as to whether the bill was indorsed before or after acceptance, and would consequently embarrass the circulation of negotiable securities, by rendering the position of acceptors hazardous and undefined.<sup>1</sup> § 779

§ 853. In accordance with the law which estops an acceptor from disputing the genuineness of the drawing, the *indorsement* by the payee of a promissory note is a conclusive admission of the handwriting of the maker;<sup>2</sup> and the indorsement of a bill of exchange will also operate as an estoppel on the indorser to deny any of the preceding signatures.<sup>3</sup> § 780

§ 854. Having now fully discussed the effect of such admissions as have been acted upon, it is right to point out that those admissions, which either *have been made without any intention of being acted upon*, or which *have not been acted upon*, or by which *the situation of the opposite party has not been prejudiced or altered*, though receivable in evidence against the parties making them, are not conclusive.<sup>4</sup> Thus, if A. contracts to sell timber § 781

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S. C.; explained and recognised by Parke, B., in *Beeman v. Duck*, 11 M. & W. 253—256. See, also *Ashpitel v. Bryan*, 32 L. J., Q. B. 91; 3 B. & S. 474, S. C.; S. C. in Ex. Ch., 5 B. & S. 723, and 33 L. J., Q. B. 328; *Phillips v. Im Thurn*, 18 Com. B., N. S. 400 & 694; 35 L. J., C. P. 220; and 1 Law Rep., C. P. 463, S. C.; 1 H. & R. 499, S. C., in a later stage.

<sup>1</sup> See *Story, Bills*, § 263; *Robinson v. Yarrow*, 7 Taunt. 458, per Park, J.; *Smith v. Chester*, 1 T. R. 654; *Canal Bk. v. Bk. of Albany*, 1 Hill, N. Y. R. 287.

<sup>2</sup> *Free v. Hawkins*, Holt, N. P. R. 550, per Gibbs, C. J.

<sup>3</sup> 45 & 46 V., c. 61, § 55.

<sup>4</sup> See *Howard v. Hudson*, 2 E. & B. 1; *White v. Greenish*, 11 Com. B., (3599)

to B., and gives him a delivery order, he may still, on B.'s bankruptcy, meet an action of trover brought by B.'s trustee, by showing that the delivery order was invalid, and therefore did not amount to a constructive delivery of the goods, provided B. has neither paid for them, nor sold them to a third party.<sup>1</sup> So, in an action against a marshal, for the escape of a prisoner arrested at the suit of the plaintiff, the defendant, by having received the prisoner into custody, is not estopped from disputing the legality of the custody.<sup>2</sup> Neither will the court treat as conclusive evidence the admission that his trade was a nuisance, by one indicted for setting it up in another place;<sup>3</sup> or the admission by the defendant, in a petition for damages by reason of adultery,<sup>4</sup> that the "*terram causa*" was the wife of the plaintiff.<sup>5</sup> So a sheriff's return, though it be conclusive evidence, in the particular cause in which it is made, or for the purposes of an attachment, does not operate as an estoppel in any other action or proceeding, either as against the sheriff or as against his bailiff.<sup>6</sup> So, also, a creditor is not estopped from bringing an action against a sheriff for a false return, by accepting the amount levied on account and towards the satisfaction of the debt mentioned in the writ;<sup>7</sup> and where a person brought an action of trover for a dog, he was held not to be precluded from proving his title to it, though he had previously authorised a third party, against whom the defendant had brought a similar action, to deliver it to the defendant, in the place of paying 50*l.*, which was the alternative directed by the verdict; the third person having, at the time of delivery, demanded back the dog, on behalf of the

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N. S. 209; *Foster v. Mentor Life Assur. Co.*, 3 E. & B. 48; *Carr v. Lond. & N. West. Ry. Co.*, 44 L. J., C. P. 109; 10 Law Rep., C. P. 307, S. C.; *Coventry v. Gt. East. Ry.*, L. R., 11 Q. B. D. 776.

<sup>1</sup> *Lackington v. Atherton*, 7 M. & Gr. 360, 363—365.

<sup>2</sup> *Contant v. Chapman*, 2 Q. B. 771.

<sup>3</sup> *R. v. Neville*, Pea. R. 91, per Ld. Kenyon.

<sup>4</sup> See 20 & 21 V., c. 85, § 33.

<sup>5</sup> *Morris v. Miller*, 4 Burr. 2057; further explained in *Rigg v. Curgenven*, 2 Wils. 399.

<sup>6</sup> *Standish v. Ross*, 3 Ex. R. 527; *Brydges v. Walford*, 6 M. & Sel. 42; 1 Stark. R. 389, n. S. C.; *Jackson v. Hill*, 10 A. & E. 477; *Remmett v. Lawrence*, 15 Q. B. 1004; *Levy v. Hale*, 29 L. J., C. P. 127; *Stimson v. Farnham*, 41 L. J., Q. B. 52; 7 Law Rep., Q. B. 175, S. C.

<sup>7</sup> *Holmes v. Clifton*, 10 A. & E. 673, overruling *Beynon v. Garrat*, 1 C. & P. 154.

plaintiff, as his property.<sup>1</sup> In these,<sup>2</sup> and the like cases,<sup>3</sup> no wrong is done to the other party, by receiving any legal evidence to show that the admission was erroneous, and by leaving the whole evidence, including the admission, to be weighed by the jury.

§ 855. The case of *Freeman v. Cooke*<sup>4</sup> carries this doctrine to § 782 its extreme limit, if it does not transgress the strict bounds of law. That was an action of trover brought against a sheriff for seizing the plaintiff's goods under a *fi. fa.* against his brother, to which the defendant pleaded not guilty, not possessed, and leave and licence. It appeared at the trial, that the plaintiff, fearing an execution, had removed his goods to his brother's house, and when the sheriff's officer came there, the plaintiff, supposing that he had a writ against himself, warned him not to seize the goods, as they belonged to his brother. The officer, however, producing his writ, which was against the brother, the plaintiff, before the goods were actually seized, told him that they were the property of a third party; but the officer disregarded this last statement, and seized and sold the goods, as belonging to the brother. On this state of facts, the jury found that the goods were the plaintiff's, but that, before the seizure, he falsely stated to the officer that they belonged to his brother, and that the officer was thereby induced to seize them as his brother's. The court, on this finding, directed the verdict to be entered for the plaintiff, on the grounds, first, that the plaintiff did not intend to induce the officer to seize the goods as those of the brother; and next, that no reasonable man would have seized the goods on the faith of the plaintiff's representations *taken altogether*.

§ 856.<sup>5</sup> In some few cases, connected with the administration of § 783 public justice and of government, admissions have been held con-

<sup>1</sup> *Sandys v. Hodgson*, 10 A. & E. 472.

<sup>2</sup> Gr. Ev. § 209, four lines.

<sup>3</sup> See ante, §§ 804—808. See, also, *Machu v. Lond. & S. West. Ry. Co.*, 2 Ex. R. 415; *Greenish v. White*, 31 L. J., C. P. 93.

<sup>4</sup> 2 Ex. R. 654, 664; 6 Dowl. & L. 187, S. C.

<sup>5</sup> Gr. Ev. § 210, in part.

does not seem alone to render it conclusive against the party; but it adds vastly to the weight of the testimony, throwing upon him the burthen of showing that it was a case of clear and innocent mistake. Thus, in a prosecution under the game laws, proof of the defendant's oath, taken under an Income Act then in force, that the yearly value of his estate was less than 100*l.*, was held not quite conclusive against him, though very strong evidence of the fact;<sup>1</sup> and the same rule has been applied where the fact sworn to was not, as it might be considered in this case, a matter of judgment, but was purely a matter of fact within the knowledge of the party swearing.<sup>2</sup> The defendant's belief of a fact, sworn to in an old answer in Chancery, is admissible evidence against him, though not conclusive.<sup>3</sup>

§ 858.<sup>4</sup> Admissions *in deeds* have already been considered in § 785 regard to parties and privies,<sup>5</sup> between whom they are generally regarded as estoppels, if properly pleaded;<sup>6</sup> and when not technically so, they are entitled to great weight, from the solemnity of their nature.<sup>7</sup> But when offered in evidence by a stranger, the adverse party may repel their effect, in the same manner as though they were only parol admissions.<sup>8</sup>

§ 859.<sup>9</sup> Other admissions, though in writing, not having been § 786 acted upon by another to his prejudice, nor falling within the

<sup>1</sup> *R. v. Clarke*, 8 T. R. 220.

<sup>2</sup> *Thornes v. White*, Tyr. & Gr. 110.

<sup>3</sup> *Doe v. Steel*, 3 Camp. 115, per *Ld. Ellenborough*. Answers in Chancery used to be always admissible at common law against the party; but apparently were not regarded as strictly conclusive, merely because they were sworn to. See *B. N. P.* 236, 237; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Grant v. Jackson*, *Pea. R.* 203; *Studdy v. Sanders*, 2 D. & R. 347; *De Whelpdale v. Milburn*, 5 Price, 485.

<sup>4</sup> *Gr. Ev.* § 211, in great part.

<sup>5</sup> *Ante*, §§ 91—100.

<sup>6</sup> *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 193; *Bowman v. Rostron*, 2 A. & E. 295, n.

<sup>7</sup> *Doe v. Stone*, 3 Com. B. 176.

<sup>8</sup> *R. v. Neville*, *Pea. R.* 91. *Woodward v. Larking*, 3 Esp. 286; *May. of Carlisle v. Blamire*, 8 East, 487, 492, 493.

<sup>9</sup> *Gr. Ev.* § 212, in great part.

reason before mentioned for estopping the party to gainsay them, are not conclusive against him, but are left at large, to be weighed with other evidence by the jury. Of this sort are *receipts*, or mere acknowledgments, given for goods or money, whether on separate papers,<sup>1</sup> or indorsed on deeds,<sup>2</sup> or on negotiable securities;<sup>3</sup> bankers' *pass-books*;<sup>4</sup> the *adjustment of a loss* on a policy of insurance, made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances;<sup>5</sup> and *accounts rendered*, such as a solicitor's bill,<sup>6</sup> and the like.<sup>7</sup> An old bill in Chancery is not admissible at all against the plaintiff in proof of the admissions it contains, since the facts stated therein are regarded as nothing more than the mere suggestions of counsel.<sup>8</sup>

§ 860. Where an executor or administrator, upon the citation of a party interested, has exhibited an *inventory* of the personal estate of a deceased person, either in the Ecclesiastical Court under the old law, or in the Probate Division of the High Court under the new law,<sup>9</sup> such document, being sworn to by the exhi-

<sup>1</sup> *Skaife v. Jackson*, 3 B. & C. 421; *Farrar v. Hutchinson*, 9 A. & E. 641; 1 P. & D. 437, S. C.; *Wallace v. Kelsall*, 7 M. & W. 273, per Parke, B.; *Bowes v. Foster*, 2 H. & N. 779, 787, per Martin, B.; *Lee v. Lanc. & Yorks. Ry. Co.*, 6 Law Rep., Ch. Ap. 527. These cases have virtually overruled *Alner v. George*, 1 Camp. 392. For American cases see *Harden v. Gordon*, 2 Mason, 541, 561; *Fuller v. Crittenden*, 9 Conn. 401; *Ensign v. Webster*, 1 Johns. 145; *Putnam v. Lewis*, 8 Johns. 389; *Stackpole v. Arnold*, 11 Mass. 27; *Tucker v. Maxwell*, id. 143; *Williamson v. Scott*, 17 Mass. 249.

<sup>2</sup> *Straton v. Rastall*, 2 T. R. 366; *Lampon v. Corke*, 5 B. & A. 611, per Holroyd, J.; 612, per Best, J. As to cases where the receipt of money is mentioned in the deed itself, see ante, § 96.

<sup>3</sup> *Graves v. Key*, 3 B. & Ad. 313.

<sup>4</sup> *Commercial Bk. of Scotl. v. Rhind*, 3 Macq. Sc. Cas. H. of L. 643.

<sup>5</sup> *Luckie v. Bushby*, 13 Com. B. 864; *Reyner v. Hall*, 4 Taunt. 725; *Shepherd v. Chewter*, 1 Camp. 274, 276, n.; *Adams v. Sanders*, M. & M. 373; 4 C. & P. 25, S. C.; *Christian v. Coombe*, 2 Esp. 489.

<sup>6</sup> *Loveridge v. Botham*, 1 B. & P. 49.

<sup>7</sup> See *Bacon v. Chesney*, 1 Stark. R. 192, 193, n. b; *Dawson v. Remnant*, 6 Esp. 24,

<sup>8</sup> *Boileau v. Rutlin*, 2 Ex. R. 685; *Doe v. Sybourn*, 7 T. R. 3, per *Ld. Kenyon*.

<sup>9</sup> 20 & 21 V., c. 77; Rules of 1862 for Ct. of Prob. in contentious business, r. 76, and Form No. 27.

bitant, will be regarded very properly as *prima facie* evidence of assets; and the executor or administrator, who has pleaded *plene administravit*, will be forced to show, either the non-existence of such assets, or that they have not reached his hands, or that they have been duly administered.<sup>1</sup> The same effect will be given to a *declaration* of the personalty of a testator or intestate, which has been made upon oath by his representative before a final settlement of the accounts.<sup>2</sup> So, where, since the 1st of June, 1881, an affidavit has been received by the Commissioners of Inland Revenue from any person applying for probate or letters of administration, verifying the account of the deceased's estate or effects, such affidavit and account will, of course, be received, whether in England or in Ireland, as at least *prima facie* evidence that the deceased left assets to the amount specified in the account,<sup>3</sup> if not as sufficient proof that such assets have been realised in due course.<sup>4</sup> In England, however, under the old law, as inventories without signature or verification used to be produced for the mere purpose of obtaining probate, they were not regarded as *prima facie* evidence of assets,<sup>5</sup> though they would seem to have furnished, in conjunction with other circumstances, *some* proof of the value of the estate. An old probate stamp,<sup>6</sup> though admissible as slight evidence of assets to the amount covered thereby, was not alone sufficient to throw upon the executors the burthen of proving the non-receipt of such assets.<sup>7</sup> Coupled, however, with proof,

<sup>1</sup> *Giles v. Dyson*, 1 Stark. R. 32, explained in *Stearn v. Mills*, 4 B. & Ad. 660, 662; *Parsons v. Hancock*, M. & M. 330, per Parke, J.; *Hickey v. Hayter*, 1 Esp. 313; 6 T. R. 384, S. C.; *Young v. Cawdrey*, 8 Taunt. 734. See *Hutton v. Rossiter*, 7 De Gex, M. & G. 9.

<sup>2</sup> See Rules of 1862 for Reg. of Ct. of Prob. in non-contentious business, Form No. 18; and Rules for Dist. Reg. of Ct. of Prob., Form No. 18; and cases cited in last note.

<sup>3</sup> 44 V., c. 12, §§ 27—29. This law has prevailed in Ireland for some years past. See *Rowan v. Jebb*, 10 Ir. Law R. 216.

<sup>4</sup> 44 V., c. 12, § 31. To understand the new law respecting probate and legacy duty, and duties on accounts, see, and study, 44 V., c. 12, §§ 26—43.

<sup>5</sup> *Stearn v. Mills*, 4 B. & Ad. 657; 1 N. & M. 434, S. C.

<sup>6</sup> An affidavit stamp is now substituted for the probate stamp, see 44 V., c. 12, § 27.

<sup>7</sup> *Mann v. Lang*, 3 A. & E. 699; *Stearn v. Mills*, 4 B. & Ad. 663, 664. These cases overrule *Foster v. Blakelock*, 5 B. & C. 328.

either of long acquiescence in the payment of the duty, or of other suspicious circumstances, it furnished a presumption of assets received, which executors found it difficult to rebut.<sup>1</sup>

§ 861.<sup>2</sup> Evidence of *oral admissions* ought always to be received † 738  
with great caution.<sup>3</sup> Such evidence is necessarily subject to much imperfection and mistake ; for either the party himself may have been misinformed, or he may not have clearly expressed his meaning,<sup>4</sup> or the witness may have misunderstood him,<sup>5</sup> or may purposely misquote the expressions used.<sup>6</sup> It also sometimes happens, that the witness, by unintentionally altering a few words, will give an effect to the statement completely at variance with what the party actually said.<sup>7</sup> But where the admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature.<sup>8</sup>

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<sup>1</sup> Mann v. Lang, 3 A. & E. 702, per Ld. Denman ; Curtis v. Hunt, 1 C. & P. 180, per Ld. Tenterden ; Rowan v. Jebb, 10 Ir. Law R. 217 ; Lazenby v. Rawson, 4 De Gex, M. & G. 556, 563, 564, per Ld. Cranworth.

<sup>2</sup> Gr. Ev. § 200, in part.

<sup>3</sup> See post, § 862.

<sup>4</sup> See Gospel of St. John, ch. 21, vv. 21—23.

<sup>5</sup> See St. Matthew, ch. 27, vv. 46, 47.

<sup>6</sup> See and compare St. John, ch. 2, vv. 18—21, and St. Matthew, ch. 26, vv. 60, 61.

<sup>7</sup> Ante, § 216, n.<sup>3</sup> Alciatus expresses the sense of the civilians to the same effect, where, after speaking of the weight of a judicial admission, "*propter majorem certitudinem, quam in se habet,*" he adds,—"Quæ ratio non habet locum quando ista confessio probaretur per testes ; imo est *minus certa cæteris probationibus,*" &c. Alciat. de Præs., Pars 2, Col. 682, n. 6. See Poth. Obl., App. No. 16, § 13 ; Lench v. Lench, 10 Ves. 517, 518.

<sup>8</sup> Rigg. v. Curgenvin, 2 Wils. 395, 399 ; Glassf. Ev. 356 ; Com. v. Knapp, 9 Pick. 507, 508, per Putnam, J. As to Admissions by Agents, see ante, §§ 602—605.

## CHAPTER XV.

## CONFESSIONS.

§ 862.<sup>1</sup> THE only topic under the general head of admissions § 789 which remains to be discussed, is that of CONFESSIONS of guilt in criminal prosecutions; and here it may be observed,—as just remarked in regard to admissions in civil proceedings,<sup>2</sup>—that the evidence of *oral* confessions of guilt ought to be *received with great caution*.<sup>3</sup> For not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory;<sup>4</sup> but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuit of evidence, to magnify slight grounds of suspicion into sufficient proof,<sup>5</sup>—together with the character of the witnesses,

<sup>1</sup> Gr. Ev. § 214, in great part.

<sup>2</sup> Ante, § 861.

<sup>3</sup> Macaulay, in his *History of England*, Vol. 1, Ch. 5, p. 583, has expressed this sentiment in forcible language. "Words," says he, "may easily be misunderstood by an honest man. They may easily be misconstrued by a knave. What was spoken metaphorically may be apprehended literally. What was spoken ludicrously may be apprehended seriously. A particle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence."

<sup>4</sup> See *Earle v. Picken*, 5 C. & P. 542, n., per Parke, B.; *R. v. Simons*, 6 C. & P. 540, per Alderson, B.; *Fost. C. L.* 243; *Coleman's case*, cited in *Joy on Confess.* 108. In *Resp. v. Fields*, Peck, R. 140, the court observed, "How easy is it for the hearer to take one word for another, or to take a word in a sense not intended by the speaker; and for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning! For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do."

<sup>5</sup> For a curious instance of this kind of exaggeration, see the evidence adduced in support of Hugh Macauley Boyd's claim to the authorship of *Junius*, 1 *Woodfall's Junius*, \*133—\*137. See ante, § 57.



who are sometimes necessarily called in cases of secret and atrocious crime,—all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where, in civil actions, it would have been received. The weighty observation of Mr. Justice Foster should also be kept in mind, that “this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted.”<sup>1</sup>

§ 863. In addition to these sources of distrust, which are often sufficient to raise a serious doubt whether the confession given in evidence was actually made by the prisoner in the words, or to the effect, stated by the witnesses, there is yet another reason why caution should be employed in receiving and weighing confessions. The statements, though made as deposed to, may be *false*. The prisoner, oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue confession;<sup>2</sup> and the same result may have arisen from a morbid

<sup>1</sup> Fost. C. L. 243. See, also, 1 Ph. Ev. 307; *Lench v. Lench*, 10 Ves. 518; *Smith v. Burnham*, 3 Sumn. 438; 4 Bl. Com. 357; *R. v. Crossfield*, 26 How. St. Tr. 109, per Mr. Adams, in his address to the jury. The civilians placed little reliance on naked confessions of guilt, not corroborated by other testimony. Carpzovius, after citing the opinion of Severus to that effect, and enumerating the various kinds of misery which tempt its wretched victims to this mode of suicide, adds—“*quorum omnium ex his fontibus contra se emissæ pronuntiatio, non tam delicti confessione firmati quam vox doloris, vel insaniæ oratio est.*” Carpz. Pract. Rer. Cr. Pars. III. Quæst. 114, p. 160. So, also, in the Eccles. Courts it is regarded with great distrust. See per Sir W. Scott, in *Williams v. Williams*, 1 Hagg. Cons. 304.

<sup>2</sup> \*Of this character was the remarkable case of the two Boorns, convicted in the Supr. Court of Vermont, in Sept. 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of weak mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a violent blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time that he was murdered; which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided; but, in 1819, one of the

ambition to obtain an infamous notoriety,<sup>1</sup> from an insane or criminal desire to be rid of life, from a reasonable wish to break off old connexions, and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade,<sup>2</sup> or even from the delusion of an overwrought and fantastic imagination.<sup>3</sup>

§ 864. Still, the actual instances of *false confessions of crime* § 790 are very rare, and <sup>4</sup> their just value has been happily stated by one

neighbours having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin and a button of his clothes were found in an old open cellar in the same field, and in a hollow stump not many rods from it were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, the prisoners were convicted and sentenced to die. On the same day, they applied to the Legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some misjudging friends, that, as they would certainly be convicted upon the circumstances proved, their only chance of life, by commutation of punishment, depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. This case, of which there is a Report in the Law Library of Harvard University, is critically examined in a learned article in the North Amer. Rev. vol. x., pp. 418—429. For another case of false confession, under a promise of pardon, see a case cited in note to Warickshall's case, 1 Lea. 264, n.

<sup>1</sup> One or other of these motives probably induced Hubert falsely to confess that he set fire to London in 1666. His confession cost him his life. See 6 How. St. Tr. 807—809, 819—821; and Wills, Cir. Ev. 70—75. See, also, General Lee's assertion that he was the author of Junius, as narrated in 1 Woodfall's Junius, \*122, \*123.

<sup>2</sup> Mr. Joy mentions the case of an innocent person making a false constructive confession, in order to fix suspicion on himself alone, that his guilty brothers might have time to escape,—a stratagem which was completely successful; after which he proved an alibi in the most satisfactory manner. Joy on Conf. 107; 1 Chit. Cr. L. 85, S. C.

<sup>3</sup> This is probably the true key to the frequent confessions of the poor wretches who, in the good old times, were wont to be tried for witchcraft. See Mary Smith's case, 2 How. St. Tr. 1049; Essex witches, 4 id. 817; Suffolk witches, 6 id. 647; Devon witches, tried in 1682, 8 id. 1017, 1037.

<sup>4</sup> Gr. Ev. § 214, n. 2.

of the most accomplished of modern jurists. "Whilst such anomalous cases," says the writer, "ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked, or so urged by the accused's counsel, as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic; and should be regarded as offensive to the intelligence both of court and jury.<sup>1</sup>

§ 865.<sup>2</sup> Indeed, all reflecting men are now generally agreed, § 791 that *deliberate and voluntary confessions of guilt, if clearly proved*, are among the most effectual proofs in the law; their value depending on the sound presumption, that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience.<sup>3</sup> Such confessions, therefore, so made by a prisoner to any person, at any time, and in any place, are at common law receivable in evidence,<sup>4</sup> while the degree of credit due to them must be estimated by the jury according to the particular circumstances of each case.

§ 866.<sup>5</sup> Confessions may be divided into two classes, namely, § 792 *judicial and extra-judicial*. *Judicial confessions* are those which are made before the magistrate, or in court, in the due course of legal proceedings; and it is essential that they be made of the free will of the party, and with full knowledge of the nature and

<sup>1</sup> 1 Hoffman on Leg. Study, p. 367.

<sup>2</sup> Gr. Ev. § 215, in part.

<sup>3</sup> Warickshall's case, 1 Lea. 263; 2 East, P. C. 658, S. C.; Lambe's case, 2 Lea. 554, 555; Mortimer v. Mortimer, 2 Hagg. Cons. 315; Harris v. Harris, 2 Hagg. Ec. R. 409; 1 Gilb. Ev. 216; Dig. lib. 42, tit. 2, de Confess.; Van Leeuw. Comm. b. v. ch. xxi. § 1; 2 Poth. Obl., App. Numb. xvi. § 13.

<sup>4</sup> Lambe's case, 2 Lea. 554; M'Nally, Ev. 42, 47.

<sup>5</sup> Gr. Ev. § 216, as to first twelve lines.

consequences of the confession. Of this kind are the preliminary examinations taken in writing by the magistrate pursuant to statute; and the plea of guilty to an indictment, made in open court. Either of these is sufficient by itself to support a conviction, though followed by a sentence of death, they both being deliberately and solemnly made under the protecting caution and oversight of the judge. Even on trials for treason or misprision of treason, where the law in its clemency affords to the accused unusual protection, a "willing confession without violence in open court," renders it unnecessary to call witnesses in support of the charge;<sup>1</sup> and, perhaps, also,—though this would seem to be highly questionable,<sup>2</sup>—a confession made during the solemnity of an examination before a magistrate or other person having authority to take it, will, if satisfactorily proved by two witnesses, be deemed sufficient evidence to warrant a conviction.<sup>3</sup> The canon law, too,—scrupulous as it is on the subject of evidence,—regards a *judicial* and free confession, made out of prison, and without any just fear or danger, as amounting, in the phrase of the Spiritual Courts, to a *plena probatio*.<sup>4</sup> The doctrine of the Roman law was also to the like effect,—*confessos in jure pro judicatis haberi placet*;—and, indeed, it may be deemed a rule of universal jurisprudence.<sup>5</sup>

§ 867.<sup>6</sup> *Extra-Judicial confessions* are those which are made by § 793 the party elsewhere than before a magistrate, or in court; this term embracing not only *express* confessions of crime, but all those admissions and acts of the accused from which guilt may be *implied*. All voluntary confessions of this kind are receivable in evidence, on being proved like other facts; and this, too, on trials for treason or misprision of treason, in like manner as on

<sup>1</sup> 7 W. 3, c. 3, § 2; extended to Ireland by 1 & 2 G. 4, c. 24; *Gregg's case*, 14 How. St. Tr. 1375.

<sup>2</sup> *Berwick's case*, Fost. C. L. 10: 18 How. St. Tr. 370, S. C.; *R. v. Willis*, 15 How. St. Tr. 624, per Ward, C. B., and 643, per Eyre, S. G.

<sup>3</sup> Fost. C. L. 240—243. See post, p. 744, n. <sup>1</sup>.

<sup>4</sup> *Ayliffe Par.* 545.

<sup>5</sup> Cod. Lib. 7, tit. 59; 1 Poth. Obl. pt. iv., ch. 3, § 1, num. 798; *Van Leeuw. Comm.* b. 5, ch. 21, § 2; 1 Masc. de Prob., Concl. 344.

<sup>6</sup> *Gr. Ev.* § 216, as to first five lines.

ordinary indictments; except, only, that, on these more serious occasions, they will not supply the want of the two witnesses, whose testimony is required by the Act of William the Third. Consequently, whether these confessions be proved by one witness or two, they can only be treated as *corroborative* evidence of the *overt act* charged;<sup>1</sup> unless such overt act be the assassination of the Queen, or any attempt to injure her person, in which event the accused may be convicted on the same evidence as an ordinary murderer.<sup>2</sup>

§ 868.<sup>3</sup> Whether on ordinary indictments for felony or mis- § 794  
demeanor, *extra-judicial confessions, uncorroborated* by any other proof of the *corpus delicti*,<sup>4</sup> are of themselves sufficient to justify a conviction of the prisoner, has been gravely doubted. In the Roman law, such naked confessions amounted only to a *semiplena probatio*, upon which alone no judgment could be founded; and at most, the accused, in particular cases, could only be put to the torture. But if voluntarily made in the presence of the injured party, or if reiterated at different times in his absence, and persisted in, they were received as plenary proof.<sup>5</sup> In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstance will be found.<sup>6</sup> Thus, in the case of Eldridge,<sup>7</sup> who was indicted for horse-stealing, the horse was found in his possession, and he had sold it for 12*l.*, after asking 35*l.*, which was its fair value. In the cases of Falkner and Bond,<sup>8</sup> the person robbed was called upon his recognizance, and it was proved that one of the prisoners had endeavoured to send a message to him to keep him from appearing. In

<sup>1</sup> *R. v. Willis*, 15 How. St. Tr. 623—625; *Fost. C. L.* 240—243; *R. v. Crossfield*, 26 How. St. Tr. 55—57.

<sup>2</sup> 39 & 40 G. 3, c. 93; 1 & 2 G. 4, c. 24, § 2, *Ir.*; 5 & 6 V., c. 51, § 1.

<sup>3</sup> *Gr. Ev.* § 217, in part.

<sup>4</sup> As to when the *corpus delicti* need not be proved, see *ante*, § 141. See, also, *R. v. Unkles*, 1 R., 8 C. L. 50.

<sup>5</sup> *Everh. Conc.*, *Concl.* xix. 8, lxxii. 5, cxxxi. 1, clxiv. 1, 2, 3, clxxxvi. 2, 3, 11; 1 *Masc. de Prob.*, *Concl.* 347, 349; *Van Leeuw. Comm.* b. 5, ch. 21, §§ 4, 5; *Carpz. Pract. Rer. Cr.*, Pars II., *Quæst.* 60, n. 8.

<sup>6</sup> See *R. v. Sutcliffe*, 4 Cox, 270.

<sup>7</sup> *R. & R.* 440.

<sup>8</sup> *Id.* 481.

White's case<sup>1</sup> there was strong circumstantial evidence both of the larceny of the oats from the prosecutor's stable, and of the prisoner's guilt; and in the case of Tippet,<sup>2</sup> who was indicted for the same larceny, part of this evidence was also given, together with the additional proof that the prisoner was an under-ostler in the same stable. In all these cases, too, except that of Falkner and Bond, the confessions were solemnly made before the examining magistrate, and taken down in due form of law; while the confessions of Falkner and Bond were repeated, once to the officer who apprehended them, and again on hearing the depositions read over which contained the charge. So, in Stone's case,<sup>3</sup> which is a very brief note, it does not appear that the corpus delicti was not otherwise proved; on the contrary, the natural inference from the report is, that it was. Wheeling's case, indeed, seems to be an exception; but it is far too briefly reported to be relied on as an authority, for it merely states that "in the case of John Wheeling, tried before Lord Kenyon, at the Summer Assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence."<sup>4</sup> In the United States, the prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient to warrant his conviction; and this opinion certainly best accords with the humanity of the criminal law, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases. Moreover, it seems countenanced by approved writers on this branch of the law.<sup>5</sup>

§ 869. Whatever may be the correct rule with respect to § 794. uncorroborated confessions as recognised by courts of criminal jurisdiction, the Divorce Division has held, that a decree for the dissolution of marriage *can* legally rest on the respondent's

<sup>1</sup> R. & R. 508.

<sup>2</sup> Dyer, 215, pl. 50.

<sup>3</sup> Id. 509.

<sup>4</sup> 1 Lea. 311, n.

<sup>5</sup> Guild's case, 5 Halst. 168, 185; Long's case, 1 Hayw. 524 (455); 4 Hawk. P. C. 425, B. 2, c. 46, § 36; 2 Russ. C. & M. 825, 826, n. b.; and R. v. Edgar, there cited.

admission of adultery, though unsupported by any confirmatory evidence.<sup>1</sup> Still, proof of this nature ought to be received with the utmost caution, and no judge would feel justified in acting upon it, unless the admission bore internal evidence of being trustworthy, and, moreover, amounted to an unequivocal acknowledgment of adultery.<sup>2</sup>

§ 870.<sup>3</sup> In the proof of confessions,—as in the case of admissions § 735 in civil causes,<sup>4</sup>—*the whole of what the prisoner said on the subject, at the time of making the confession, should be taken together.* This rule is the dictate of reason, as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connexion with the crime; but it is not reasonable to assume, that the entire proposition, with all its limitations, was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation. As the meaning of a writing must, in civil cases, be collected from the whole taken together, and as, when several instruments relating to the same matter have been executed at one time, they are all resorted to for the purpose of ascertaining the intention of the parties; so here, if one part of a conversation is relied on, as proof of a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; or at least so much as is explanatory of the part already proved, and perhaps, in favorem vitæ, all that was relative to the subject-matter in issue.<sup>5</sup> For, as already observed respecting admissions,<sup>6</sup> unless the whole is considered, the true meaning of the part which is evidence against him cannot be ascertained.

§ 871. But if, after the entire statement of the prisoner has been § 735

<sup>1</sup> Robinson v. Robinson & Lane, 1 Swab. & Trist. 362; 27 L. J., Pr. & Mat. 91, S. C.; Williams v. Williams & Padfield, 35 L. J., Pr. & Mat. 8; 1 Law Rep., P. & D. 29, S. C.; Le Marchant v. Le Marchant & Radcliff, 45 L. J., P. D. & A. 43.

<sup>2</sup> Id.

<sup>3</sup> Gr. Ev. § 218, in great part.

<sup>4</sup> Ante, §§ 725—734.

<sup>5</sup> Per Id. C. J. Abbott, in the Queen's case, 2 B. & B. 297, 298; as qualified by the court in Prince v. Samo, 7 A. & E. 634, 635; R. v. Jones, 2 C. & P. 629; R. v. Higgins, 2 C. & P. 603.

<sup>6</sup> Ante, §§ 725—729, and cases there cited.

given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another.<sup>1</sup> Even without such contradiction it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing.<sup>2</sup> If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury; but they are not bound to give weight to it on that account, being at liberty to judge of it, like other evidence, by all the circumstances of the case.<sup>3</sup> And if the confession implicate other persons by name, still it must be proved as it was made, not omitting the names; but the judge will instruct the jury, that it is not evidence against any one but the prisoner who made it.<sup>4</sup> This last proposition was strikingly illustrated in the case of *Robinson v. Robinson and Lane*,<sup>5</sup> which was a suit for dissolution of marriage on the ground of the wife's adultery, and in which a private diary kept by her, describing her intrigues with the co-respondent, was received as a confession against herself, though it was held to be inadmissible as evidence against her paramour.

§ 872.<sup>a</sup> Before any confession can be received in evidence in a criminal case, it must be shown to have been *voluntarily* made; for, —to adopt the somewhat inflated language of Chief Baron Eyre,—

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<sup>1</sup> *R. v. Jones*, 2 C. & P. 629.

<sup>2</sup> *R. v. Higgins*, 3 C. & P. 603, per Parke, J.; *R. v. Steptoe*, 4 C. & P. 397, per Park, J.; *Resp. v. McCarty*, 2 Dall. 86, 89.

<sup>3</sup> Per Littledale, J., in *R. v. Clewes*, 4 C. & P. 221.

<sup>4</sup> *R. v. Hearne*, 4 C. & P. 215, per Littledale, J.; *R. v. Clewes*, id. 221, 225, per id.; *R. v. Fletcher*, id. 250, per id.; 1 Lew. C. C. 107, S. C.; *R. v. Hall*, 1 Lew. C. C. 110, per Alderson, B; *R. v. Foster*, id. per Ld. Denman; *R. v. Walkley*, 6 C. & P. 175, per Gurney, B., who said it had been much considered by the judges; Parke, J., thought otherwise in *Barstow's case*, 1 Lew. C. C. 110.

<sup>5</sup> 27 L. J., Pr. & Mat. 91; 1 Swab. & Trist. 362, S. C.

<sup>a</sup> Gr. Ev. § 219, in part.



"a confession, forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."<sup>1</sup> The material question, consequently, is, whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is,—as we have seen,<sup>2</sup>—addressed to the judge, who will require the prosecutor to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession.<sup>3</sup> As the admission or rejection of a confession rests wholly in the discretion of the judge, it is difficult to lay down particular rules, *a priori*, for the government of that discretion; and the more so, because much must necessarily depend on the age, experience, intelligence, and character of the prisoner, and on the circumstances under which the confession was made.<sup>4</sup> Language sufficient to overcome the mind of one, may have no effect upon that of another; a consideration which may serve to reconcile some contradictory decisions, where the principal facts appear similar in the reports, but the lesser circumstances, though often very material in such preliminary inquiries, are omitted. Still, it cannot be denied, that this rule has been sometimes extended much too far, and been applied to cases where no reason could be given for supposing that the inducement had had any influence upon the mind of the prisoner.<sup>5</sup>

§ 873. Difficult as it is to lay down any definite rule on this subject, which can be used as an unerring guide in every supposable case, there are still some points, both in regard to the *person by whom the promise or threat is made*, and also in regard to the *nature of the inducement itself*, on which the judges appear to be

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<sup>1</sup> In Warickshall's case, 1 Lea. 263, 264; McNally, Ev. 47; Knapp's case, 10 Pick. 489, 490; Chabcock's case, 1 Mass. 144.

<sup>2</sup> Ante, § 23.

<sup>3</sup> R. v. Warringham, 2 Den. 447, per Parke, B.

<sup>4</sup> McNally, Ev. 43; Nute's case, 6 Petersd. Abr. 82; Knapp's case, 10 Pick. 496.

<sup>5</sup> See the observations of the judges in R. v. Baldry, 2 Den. 430.

pretty generally agreed, and a knowledge of which will materially assist the inquiry, whether any particular confession should be admitted in evidence or rejected. And <sup>1</sup> first, as to *the person by whom the inducement is offered*. Here it is very clear, that if the promise or threat be made by any one *having authority* over the prisoner in connexion with the prosecution,<sup>2</sup>—as, for instance, by the prosecutor,<sup>3</sup> the master or mistress of the prisoner, when the offence concerns such master or mistress,<sup>4</sup> the constable,<sup>5</sup> or other officer,<sup>6</sup> having him in custody, a magistrate,<sup>7</sup> or the like,<sup>8</sup>—the confession will be rejected as not being voluntary. And the same rule will perhaps prevail, though the inducement was not actually offered by the person in authority, if it were held out by *any one in his presence*, and he by his silence has *sanctioned* its being made.<sup>9</sup>

§ 874. In these cases, as the authority possessed by the persons § 798

<sup>1</sup> Gr. Ev. § 222, in part.

<sup>2</sup> R. v. Parratt, 4 C. & P. 570, per Alderson, B., which was a confession by a sailor to his captain, who threatened him with prison on a charge of stealing his watch; R. v. Thompson, 1 Lea. 291; R. v. Fleming, 1 Arm. M. & O. 330.

<sup>3</sup> R. v. Cass, 1 Lea. 293, n. a, per Gould, J.; R. v. Jones, R. & R. 152; R. v. Jenkins, id. 492.

<sup>4</sup> R. v. Moore, 3 C. & Kir. 153; 2 Den. 522, 527, S. C.; R. v. Warringham, 2 Den. 447, n.; R. v. Upchurch, 1 Moo. C. C. 465; R. v. Taylor, 8 C. & P. 734, per Patteson, J.; R. v. Hearn, C. & Marsh. 109, per Coltman, J.; R. v. Hewett, id. 534, per Patteson, J.

<sup>5</sup> R. v. Morton, 2 M. & Rob. 514, per Coleridge, J.; R. v. Swatkins, 4 C. & P. 548, per Patteson, J.; R. v. Mills, 6 id. 146, per Gurney, B.; R. v. Shepherd, 7 id. 579, per Gaselee, J.

<sup>6</sup> In R. v. Enoch, 5 C. & P. 539, Park and Taunton, Js., rejected a confession, where the prisoner was left in charge of a woman, to whom she confessed; and in R. v. Windsor, 4 Fost. & Fin. 366, Channell, B., and Crompton, J., laid down the law in a similar manner. Sed qu., and see R. v. Sleeman, Pearce & D. 249; and R. v. Vernon, 12 Cox, 153.

<sup>7</sup> R. v. Drew, 8 C. & P. 140, per Coleridge, J.; R. v. Cooper, 5 C. & P. 535, per Parke, J.; Guild's case, 5 Halst. 163.

<sup>8</sup> Qu. a surgeon; see R. v. Kingston, 4 C. & P. 387; R. v. Garner, 3 Sess. Cas. 329; 1 Den. 329; 2 C. & Kir. 920, S. C. In this last case the inducement was held out by a surgeon, but in the presence of the prisoner's master. Qu. also, the husband of the prisoner, R. v. Laughner, 2 C. & Kir. 225.

<sup>9</sup> R. v. Pountney, 7 C. & P. 302, per Alderson, B.; R. v. Taylor, 8 C. & P. 734, per Patteson, J.; R. v. Drew, 8 C. & P. 140, per Coleridge, J.; R. v. Simpson, 1 Moo. C. C. 410, explained in Joy on Conf. 9—11; R. v. Laughner, 2 C. & Kir. 225, per Pollock, C. B.; R. v. Luckhurst, Pearce & D. 245. But see R. v. Parker, L. & Cave, 42; 8 Cox, 465, S. C.

who make or sanction the inducement is calculated both to animate the prisoner's hopes of favour, on the one hand, and, on the other, to inspire him with awe, and in some degree to overcome the powers of his mind, the law assumes the possibility, if not the probability, of his making an untrue admission, and, consequently, withdraws from the consideration of the jury any declaration of guilt, which the prisoner under these circumstances may be induced to make. Moreover,—and this is a more sensible reason for the rule,—the admission of such evidence would naturally lead the inferior agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners, in the hope of wringing from them a reluctant confession. It has been argued, with apparent reason, that a confession made upon the promises or threats of a person, assuming to act in the capacity of an officer or magistrate, and erroneously believed by the prisoner to possess such authority, ought, upon the above principles, to be excluded; but the point is not known to have received any judicial consideration.

§ 875.<sup>1</sup> Whether a confession *made to a person, who having no authority has held out an inducement*, will be receivable, is a question upon which learned judges are known to entertain opposite opinions.<sup>2</sup> On two occasions, Mr. Justice Bosanquet distinctly held that the fact of *any* person telling a prisoner that it would be better for him to confess, would *always* exclude any confession made to *that person*;<sup>3</sup> and one or two other cases may perhaps be cited in support of the same view.<sup>4</sup> On the other hand, Mr. Justice

<sup>1</sup> Gr. Ev. § 223, in part.

<sup>2</sup> R. Spencer, 7 C. & P. 776, per Parke, B. See, also, R. v. Pountney, *id.* 302, per Alderson, B.; R. v. Gibbons, 1 C. P. 98, n. b.

<sup>3</sup> R. v. Dunn, 4 C. & P. 543; R. v. Slaughter, *id.* 544, n. b. In R. v. Downing, Chelmsford Sp. Ass. 1840, MS., where a woman was indicted for child-murder, a confession made by her to an elderly woman, who was her neighbour and nurse, and who told her it was better for her to confess, was held by Ld. Abinger to be inadmissible; and his lordship refused to admit evidence of a confession subsequently made to a surgeon. *Sed qu.*

<sup>4</sup> For instance, R. v. Kingston, 4 C. & P. 387, where Parke and Littledale, Js., rejected a confession made to a surgeon who had held out an inducement. Perhaps, however, this case may rest on the ground that the surgeon was a person in authority. In R. v. Walkley, 6 C. & P. 175, where evidence of a confession was held inadmissible by Gurney, B., it does not appear, whether

Patteson is reported to have said, in a more recent case, that, *in the opinion of the judges*, any confession is receivable, unless some inducement has been held out by a person in *authority*; and his lordship added, with reference to the particular facts of the case before him, that he would have received in evidence the statement made by the prisoner to an indifferent person, had the inducement been offered by such person alone.<sup>1</sup>

§ 876. Both these contradictory decisions would seem to be open to one and the same objection; namely, they endeavour to define, *as a strict rule of law*, what circumstances shall be deemed, *in all cases*, to have unduly influenced the mind of the prisoner in making the confession. Now, although such a rule has been laid down with reference to inducements offered by persons in authority, because, being thought to succeed in a large majority of instances, it has, for the sake of uniformity and precision, been wisely adopted as applicable to them all; yet it by no means follows, that the same rule will equally apply to all promises and threats held out by private persons. These last inducements may vary in their effect to almost any conceivable extent. They will often be obviously insufficient to produce the slightest influence on even the feeblest mind; and, in such cases, the confession which follows, but which, in fact, is not *consequent* on them, should be admitted in evidence. On the other hand, an inducement held out by a private individual may be, and, indeed, frequently is, quite as much calculated to cause the prisoner to utter an untrue statement, as any promise made to him by a person in authority; in these cases the confession made to such private person should be excluded. It is therefore submitted, that, without laying down any positive rule, whether of admission or rejection, the judge should determine each case on its own merits; only bearing in mind, that his duty is to reject such confessions only, as would seem to have been wrung from the prisoner, under the supposition that it would be best for

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or not the witness, to whom the statement was made, and who had offered the inducement, was a person in authority; and the same observation applies to the case of *R. v. Thomas*, id. 353, per Patteson, J. See, also, *Guild's case*, 5 Halst. 163; and *Knapp's case*, 10 Pick. 496, 500—510.

<sup>1</sup> *R. v. Taylor*, 8 C. & P. 734; *R. v. Sleeman*, Pearce & D. 249.

him to admit that he was guilty of an offence which he really never committed.<sup>1</sup>

§ 877.<sup>2</sup> Be the law, however, on this particular point what it may, thus much is clear, that a promise or threat made by an *indifferent person*, who has officiously interfered without any kind of authority, will *never* operate to exclude a confession made to *any other person*, who has not himself sanctioned the inducement.<sup>3</sup> This rule is founded, partly, on the supposition that such inducements will seldom much influence the conduct of the prisoner; but chiefly, on the ground that, were a contrary rule to prevail, it would probably open a wide door to collusive practices, and would certainly go far towards rendering all confessions inadmissible. Prisoners, who wished to avoid the consequences of their inconvenient acknowledgments of guilt, might with ease find associates ready to affirm, that they had advised them to confess; and even if this stratagem were not attempted, injudicious advice given by meddling persons, would frequently have the effect of shutting out a distinct and positive confession, and of thus embarrassing the course of criminal justice.

§ 878. Where promises or threats have been once used of such a nature as to render a confession inadmissible, all *subsequent* admissions of the same or the like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume, that the delusive hope or fear which *influenced* the first confession has been *effectually dispelled*.<sup>4</sup> Where,<sup>5</sup> however, it appears, to the

<sup>1</sup> R. v. Court, 7 C. & P. 487, per Littledale, J.      <sup>2</sup> Gr. Ev. § 223, in part.

<sup>3</sup> R. v. Gibbons, 1 C. & P. 87, per Park, J., and Hullock, B.; R. v. Hardwick, id. 98, n. b. per Wood, B.; R. v. Row, R. & R. 153; R. v. Tyler, 1 C. & P. 129, per Hullock, B.

<sup>4</sup> Joy on Conf. 69; Guild's case, 5 Halst. 180; R. v. Hewett, C. & Marsh. 534, per Patteson, J., recognising Meynell's case, 2 Lew. C. C. 122, per Taunton, J.; Sherrington's case, id. 123, per Patteson, J.; R. v. Cooper, 5 C. & P. 535, per Parke, J.; Bell's case, cited in Joy on Conf. 71, and in McNally, Ev. 43, per Ld. Kilwarden, C. J., and Carleton, C. J. of C. P.; R. v. Rosa Rue, 13 Cox, 209; Roberts' case, 1 Dev. 259, 294; R. v. Walsh, Ir. Cir. R. 866, per Jackson, J.

<sup>5</sup> Gr. Ev. § 221, in part. See R. v. Doherty, 13 Cox, 23.

satisfaction of the judge, that the improper *influence was totally done away before* the confession was made, the evidence will be received.<sup>1</sup> Thus, where a magistrate told a prisoner charged with murder, that if he was not the man who struck the fatal blow, and would disclose all he knew respecting the matter, he would use his influence to protect him; but on subsequently receiving a letter from the Secretary of State refusing mercy, he communicated its contents to the prisoner, it was held that a confession, which the prisoner afterwards made to the coroner, who had also duly cautioned him, was clearly voluntary, and as such it was admitted.<sup>2</sup> So, where the accused had been induced by promises of favour to make a confession, which was for that cause excluded, but some months afterwards, and after he had been solemnly warned by two magistrates that he must expect death and prepare to meet it, he again fully acknowledged his guilt, this latter confession was received in evidence.<sup>3</sup> Indeed, it may be generally laid down, that, though an inducement has been held out by an officer, a prosecutor, or the like, and though a confession has been made in consequence of such inducement, still, if the prisoner be subsequently warned by a person in equal or superior authority, that what he may say will be evidence against himself, or that a confession will be of no benefit to him,—or if he be simply cautioned by the magistrate not to say anything against himself,—any admission of guilt afterwards made, will be received as a voluntary confession.<sup>4</sup> More doubt may be entertained as to the law, if the promise has proceeded from a person of superior authority, as a magistrate, and the confession is afterwards made to an inferior officer; because a caution from this latter person might be insufficient to efface the expectation of mercy, which had previously been raised in the prisoner's mind.<sup>5</sup>

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<sup>1</sup> See *R. v. Cheverton*, 2 Fost. & Fin. 833.

<sup>2</sup> *R. v. Clewes*, 4 C. & P. 221, per Littledale, J. See, also, *R. v. Dingley*, 1 C. & Kir. 637.

<sup>3</sup> *Guild's case*, 5 Halst. 163, 168.

<sup>4</sup> *R. v. Howes*, 6 C. & P. 404, per Ld. Denman; *R. v. Lingate*, 1 Ph. Ev. 410; *R. v. Rosier*, id. 410, 411; *R. v. Bryan, Jebb*, C. C. 157; *Joy on Conf.* 72—74. See *R. v. Richards*, 5 C. & P. 318.

<sup>5</sup> *R. v. Cooper*, 5 C. & P. 535, per Parke, J.

§ 879. Passing now to the *nature of the inducement*, it may § 803 be laid down as a general rule, that in order to exclude a confession, the inducement, whether it assume the shape of a promise, a threat, or mere advice, must have reference to the prisoner's *escape from the criminal charge* against him. It is not here meant that at the time when the inducement is held out, the charge against the prisoner must actually have been made; for where a man was threatened to be given into custody without any offence being then specified, but afterwards the nature of the charge was stated, and he confessed his guilt, the judges held that the confession was not admissible.<sup>1</sup> Still, the promise or threat, to have the effect of excluding the statement, must be such as is calculated to influence the prisoner's mind with respect to his escape from the charge. A confession, therefore, will be received, though it were induced by *spiritual exhortations*, whether of a clergyman,<sup>2</sup> or of any other person;<sup>3</sup> for such a confession can scarcely be regarded as *untrue*; and the law of England, Ireland, and America,—unlike that which prevails in Scotland,<sup>4</sup> or in other countries subject to the Roman law,<sup>5</sup>—does not, as will presently be pointed out,<sup>6</sup> regard penitential confessions to a priest in the light of privileged communication.

§ 880. Again, a promise of some merely *collateral benefit* or § 803

<sup>1</sup> R. v. Luckhurst, Pearce & D. 245.

<sup>2</sup> R. v. Gilham, 1 Moo. C. C. 186; explained in Joy on Conf. 52—56; Com. v. Drake, 15 Mass. 161. But see R. v. Griffin, 6 Cox, 219, cited post, p. 789, ad fin. n. 5.

<sup>3</sup> R. v. Wild, 1 Moo. C. C. 452; R. v. Nute, 2 Russ. C. & M. 832, 833; recognised in R. v. Hewett, C. & Marsh. 538, per Patteson, J.; R. v. Gibney, Jebb, C. C. 15; R. v. Sleeman, Pearce & D. 249.

<sup>4</sup> 2 Alison, Cr. L. of Scot. 586, cited in Joy on Conf. 57, n. a, 58.

<sup>5</sup> In the Roman law penitential confessions to the priests are encouraged for the relief of the conscience, and the priest is bound to secrecy by the peril of punishment. "*Confessio coram sacerdote in penitentia facta non probat in judicio; quia censetur facta coram Deo; imo, si sacerdos eam enunciet, incidit in poenam.*" 1 Masc. de Prob., Concl. 377. It was lawful, however, for the priest to testify in such cases to the fact, that the party had made such a penitential confession to him as the Church requires, and that he had enjoined penance upon him; and, with the express consent of the penitent, he might lawfully testify to the substance of the confession itself. Id.

<sup>6</sup> Post, §§ 916, 917.

boon, as for instance, a promise to give the prisoner some 'spirits,'<sup>1</sup> or to strike off his hand-cuffs,<sup>2</sup> or to let him see his wife,<sup>3</sup> will not be deemed such an inducement as will authorise the rejection of a confession made in consequence. Neither will an inducement held out to a prisoner with reference to one charge, exclude a consequent confession which relates to another;<sup>4</sup> unless the two offences be so blended together as to constitute in reality but one transaction.<sup>5</sup> So, where a woman was indicted for concealing the birth of her child, her acknowledgment that she had been confined has in Ireland been received in evidence, though made in consequence of the doctor having threatened that he would examine her person.<sup>6</sup> It is right, however, to add that, under precisely similar circumstances, two English judges of ability have refused to admit evidence so obtained,<sup>7</sup> and, consequently, this last point must be considered as one still open to debate. Be this as it may, confessions will in general be admitted, though caused by intimidating language, provided the intimidation has had no reference to the charge, and was not otherwise calculated to produce any untrue statement.<sup>8</sup>

§ 881.<sup>9</sup> Moreover, if no inducement has been held out relating to the charge, it matters not *in what way* the confession has been obtained; for whether it were induced by a solemn *promise of secrecy*, even confirmed by an oath;<sup>10</sup> or by reason of the prisoner having been made *drunken*;<sup>11</sup> or even, by any *deception* practised

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<sup>1</sup> R. v. Sexton, cited in Joy on Conf. 17—19, is to the contrary; but this case, which was decided by Best, J., is probably not law. See observations of Mr. Greaves in 2 Russ. C. & M. 827, n. k.

<sup>2</sup> R. v. Green, 6 C. & P. 655, per Bosanquet and Taunton, Ja.

<sup>3</sup> R. v. Lloyd, 6 C. & P. 393, per Patteson, J.

<sup>4</sup> R. v. Warner, cited 2 Russ. C. & M. 845, per Littledale, J.

<sup>5</sup> R. v. Hearn, C. & Marsh. 109, per Coltman, J.

<sup>6</sup> R. v. Cain, 1 Craw. & D., C. C. 37.

<sup>7</sup> R. v. Bowden, decided at the Liverpool Assizes, Dec. 1859, by Martin, B., after consulting Willes, J.; MS. ex relatione, Mr. Ch. Hy. Hopwood.

<sup>8</sup> See R. v. Thornton, 1 Moo. C. C. 27, 28.

<sup>9</sup> Gr. Ev. § 229, in part.

<sup>10</sup> R. v. Shaw, 6 C. & P. 372, per Patteson, J., Com. v. Knapp, 9 Pick. 496, 500—510.

<sup>11</sup> R. v. Spilsbury, 7 C. & P. 187, per Coleridge, J., qu. on the ground that  
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upon him, or false representation made to him for that purpose;<sup>1</sup> it will be equally admissible, however much the mode of obtaining it may be open to censure, or may render the statement itself liable to suspicion. Much less will a confession be rejected, merely because it has been elicited by *questions* put to the prisoner, whether by a magistrate,<sup>2</sup> officer,<sup>3</sup> or private person;<sup>4</sup> and the form of the question is immaterial, even though it assumes the prisoner's guilt.<sup>5</sup> So, if a prisoner makes a confession under the hope, held out by a person *not in authority*, that he will thereby be admitted as Queen's evidence, it will be received against him;<sup>6</sup> and the same result will follow, though his hopes have been excited by a constable or other officer, if on the trial of his accomplices he refuses to make a full disclosure, and thus violates the condition on which his claim to favour can alone rest.<sup>7</sup> So, what the accused has been *overheard* muttering to himself, or saying to his wife or to any other person in confidence,

*in vino veritas*. In the case of *R. v. Sippet*, which was tried at Maidstone Ass. 1839, a confession, made by the prisoner *while talking in his sleep*, was tendered in evidence; but as Tindal, C. J., doubted its admissibility, it was withdrawn. MS.

<sup>1</sup> *R. v. Derrington*, 2 C. & P. 418, per Garrow, B.; *R. v. Burley*, 2 St. Ev. 13, n. z, and 37, per Garrow, B., afterwards confirmed by all the judges.

<sup>2</sup> *R. v. Rees*, 7 C. & P. 569, per Ld. Denman; *R. v. Bartlett*, id. 832, per Bolland, B.; *R. v. Ellis*, Ry. & M. 432, per Littledale, J., citing a similar decision of Holroyd, J., and overruling *R. v. Wilson*, Holt, N. P. R. 597, per Richards, C. B.

<sup>3</sup> *R. v. Thornton*, 1 Moo. C. C. 27; *R. v. Gibney*, Jebb, C. C. 15; *R. v. Kerr*, 8 C. & P. 176; *R. v. Johnston*, 15 Ir. Law R. N. S. 60, per 8 v. 3, Ja. The case of *R. v. Devlin*, 2 Craf. & D., C. C. 152, is *contra*, but seems not to be law.

<sup>4</sup> *R. v. Wild*, 1 Moo. C. C. 452.

<sup>5</sup> *R. v. Wild*, 1 Moo. C. C. 452; *R. v. Thornton*, id. 27; *R. v. Kerr*, 8 C. & P. 179, per Park, J.; Anon., per Littledale, J., cited 1 Ph. Ev. 406. In the case of *R. v. Doyle*, 1 Craf. & D., C. C. 396, a constable, after cautioning the prisoner, asked her how so much of her blue came into the child's stomach, and Bushe, C. J., is reported to have rejected the answer; but this case, it is submitted, is not law. See Joy on Conf. 32—41, 42—44.

<sup>6</sup> *R. v. Berigan*, Ir. Cir. R. 177, per Crampton, J. This case seems to overrule *R. v. Hall*, 2 Lea, 560, n., per Mr. Sergt. Adair. See *R. v. Boswell*, C. & Marsh. 584; *R. v. Blackburn*, 6 Cox, 333. See, also, post, § 885.

<sup>7</sup> *R. v. Dingley*, 1 C. & Kir. 640, per Pollock, C. B.; *R. v. Burley*, 2 St. Ev. 13, n. z, approved of by all the judges. See *R. v. Gillis*, 11 Cox, 69.

will be receivable in evidence;<sup>1</sup> though the wife, solicitor, and counsel of the prisoner will not, on grounds that will be presently explained, be themselves allowed to reveal what he has said to them.<sup>2</sup> A voluntary confession, too, is admissible, to whomsoever it may have been made, though it does not appear that the prisoner was *warned* that what he said would be used against him; nay, though it appears on the contrary that he was *not* so warned.<sup>3</sup>

§ 882. In most cases, indeed, it may be advisable and proper § 805 to caution the prisoner in general terms, that any confession he makes will be admissible against him at the trial, and can do him no service;<sup>4</sup> because, if it should turn out that any threat or inducement has been previously held out by some person in authority, the confession, which is unaccompanied by such caution, will, as before stated,<sup>5</sup> be inadmissible. Still, it is not necessary, in general, to do more than to show that the party receiving the confession left the prisoner at full liberty to act and judge for himself; and though it should appear that immediately before the admission was made the accused was in the custody of another person, the court, unless some reason exists for suspecting collusion, will not compel the prosecutor to call such person as a witness, or to prove that he did not hold out any threat or inducement.<sup>6</sup> In order, however, to free the evidence from all reasonable objection, it will be prudent, especially in important cases, to call any persons in authority, who, shortly before the confession

<sup>1</sup> *R. v. Simons*, 6 C. & P. 541, per Alderson, B. In *R. v. Pamenter*, 12 Cox, 177, Kelly, C. B., is reported to have held that a letter written by a prisoner to his wife, and intercepted by a constable who had undertaken to post it, was inadmissible. But this case would seem not to be law.

<sup>2</sup> Post, §§ 909—915; *R. v. Shaw*, 6 C. & P. 373, per Patteson, J.

<sup>3</sup> *R. v. Thornton*, 1 Moo. C. C. 27; *R. v. Gibney, Jebb*, C. C. 15, 17, 18, 20; *R. v. Magill*, cited in *McNally*, Ev. 38; *R. v. Long*, 6 C. & P. 179, per Gurney, B.; *Joy on Conf.* 45—48; *R. v. Lavin*, Ir. Cir. R. 813, per Perrin, J.

<sup>4</sup> *R. v. Green*, 5 C. & P. 312, per Gurney, B.; *R. v. Arnold*, 8 C. & P. 622, per Ld. Denman; *R. v. O'Reilly*, Ir. Cir. R. 718, per Ball, J.

<sup>5</sup> Ante, § 878.

<sup>6</sup> *R. v. Clewes*, 4 C. & P. 423, per Littledale, J.; *R. v. Swatkins*, id. 550, per Patteson, J.; *R. v. Gibney, Jebb*, C. C. 15; *R. v. Courtney*, 2 Crawf. & D., C. C. 63, per Ball, J.; *Joy on Conf.* 59—61.

was made, either had the prisoner in custody, or held any conversation with him.<sup>1</sup> Notwithstanding the law is as above stated, many justices of the peace, both in England and Ireland, are in the habit of *dissuading* the culprit, with more or less earnestness, from disclosing any fact which may tend to establish his guilt. This practice, which is rather to be admired for romantic generosity than for wisdom, or for any beneficial consequences resulting therefrom to the public,<sup>2</sup> has been very properly condemned by several able judges, as an absurd and improper mode of shutting up one of the most valuable sources of justice and truth.<sup>3</sup>

§ 883.<sup>4</sup> It has been thought that *illegal imprisonment* is calculated to exert such influence upon the mind of the prisoner, as to justify the inference that his confessions made during its continuance were not voluntary; and on one occasion, they appear on this ground to have been rejected.<sup>5</sup> But this doctrine cannot yet be considered as satisfactorily established.<sup>6</sup>

§ 884. From the preceding observations and cases, it is clear that a confession, to be inadmissible, must have been made in consequence of some inducement or threat, which, being held out or sanctioned by a person in authority, related to the prisoner's escape from the charge against him. Still, the question remains, what language is sufficient to constitute such inducement or threat; and here the reported decisions certainly furnish a very unsatisfactory guide. Some reason may be given for applying the rule to such words as these:—"Unless<sup>7</sup> you give me a more satisfactory account, I will take you before a magistrate;"<sup>8</sup> "If

<sup>1</sup> See cases cited in last note.

<sup>2</sup> Edinb. Rev., March, 1824.

<sup>3</sup> *R. v. Green*, 2 C. & P. 312, per Gurney, B.; *R. v. Arnold*, 8 C. & P. 622, per Ld. Denman. In *R. v. Cart*, Maidstone Sum. Ass. 1838, MS., Ld. Denman observed to some constables, who were called as witnesses:—"The distinction is very clear; you are not to suppress the truth, but you are not to take any measures of your own to endeavour to extort it."

<sup>4</sup> Gr. Ev. § 230, almost verbatim.

<sup>5</sup> *R. v. Ackroyd*, 1 Lew. C. C. 49, per Holroyd, J.

<sup>6</sup> *R. v. Thornton*, 1 Moo. C. C. 27; 1 Lew. C. C. 49, S. C.

<sup>7</sup> Gr. Ev. § 220, in part.

<sup>8</sup> *R. v. Thompson*, 1 Lea. 291, per Hotham, B.; *R. v. Luckhurst*, Pearce & D. 245; *R. v. Richards*, 5 C. & P. 318, per Bosanquet, J.; S. C. cited (3626)

you will tell me where my goods are, I will be favourable to you;"<sup>1</sup> "I only want my money, and if you give me that, you may go to the devil;"<sup>2</sup> "If you will not tell all you know about it, of course we can do nothing;"<sup>3</sup> "You are under suspicion of this, and you had better tell all you know;"<sup>4</sup> "The watch has been found, and if you do not tell me who your partner was, I will commit you to prison;"<sup>5</sup> "You had better split, and not suffer for all of them."<sup>6</sup> But when confessions have been rejected in consequence of such expressions as the following having been used:—"It will be better for you to speak the truth;"<sup>7</sup> "The inspector tells me you make housebreaking tools; if so, you had better tell the truth, it will be better for you."<sup>8</sup> "It is of no use for you to deny it, for there are the man and boy who will swear they saw you do it;"<sup>9</sup> "Now, be cautious in the answers you give me to the questions I am going to put to you about this watch;"<sup>10</sup> "Whatever you say will be taken down and used against you;"<sup>11</sup> "Do not say anything to prejudice yourself, as what you say I shall take down, and it will be used for you or against you at your trial;"<sup>12</sup> "What you are charged with is a very heavy offence, and you must be very careful in making any statement to me, or anybody else, that may tend to injure you; but anything you can say in your defence, we shall be ready to hear, or send to assist you;"<sup>13</sup>—in

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as *R. v. Griffiths*, 2 Russ. C. & M. 832; *R. v. Walsh*, Ir. Cir. R. 866, per Jackson, J.

<sup>1</sup> *R. v. Cass*, 1 Lea. 293, n. a, per Gould, J.; *Boyd v. The State*, 2 Humph. 37.

<sup>2</sup> *R. v. Jones*, R. & R. 152.

<sup>3</sup> *R. v. Partridge*, 7 C. & P. 551, per Patteson, J. See, also, *Guild's case*, 5 Halst. 163.

<sup>4</sup> *R. v. Kingston*, 4 C. & P. 387, per Parke and Littledale, Js.; *R. v. Cheverton*, 2 Fost. & Fin. 833, per Erle, C. J.

<sup>5</sup> *R. v. Parratt*, 4 C. & P. 570, per Alderson, J.; *R. v. Upchurch*, 1 Moo. C. C. 465.

<sup>6</sup> *R. v. Thomas*, 6 C. & P. 353, per Patteson, J.

<sup>7</sup> *R. v. Garner*, 2 C. & Kir. 920; 3 Sess. Cas. 329; 1 Den. 329, S. C.

<sup>8</sup> *R. v. Fennell*, L. R., 7 Q. B. D. 147; 50 L. J., M. C. 126; and 14 Cox, 607, S. C. See *R. v. Mansfield*, 14 Cox, 639.

<sup>9</sup> *R. v. Mills*, 6 C. & P. 146, per Gurney, B.

<sup>10</sup> *R. v. Fleming*, 1 Arm. M. & O. 330.

<sup>11</sup> *R. v. Harris*, 1 Cox, 106, per Maule, J.

<sup>12</sup> *R. v. Drew*, 8 C. & P. 140, per Coleridge, J.

<sup>13</sup> *R. v. Morton*, 2 M. & Rob. 514, per id.

these, and the like cases, it is only too apparent, that justice and common sense have been sacrificed on the shrine of mercy. Indeed, the judges themselves have of late years come to this conclusion,<sup>1</sup> and after a solemn discussion of the subject in the Court of Criminal Appeal, they have expressly overruled the last three decisions cited above, as cases which are discreditable to the law.<sup>2</sup> So anxious was the court at one time to exclude evidence of confessions, that exhortations not to tell lies, but to *speake the truth*, have been deemed likely to induce a *false* acknowledgment of guilt; and, consequently, admissions made after such exhortations have more than once been rejected.<sup>3</sup> But this paradoxical opinion is now happily exploded.<sup>4</sup>

§ 885. Where the inducement relates to the charge against the prisoner, and comes from a person in authority, it is *not necessary* that it should be *directly held out to the prisoner himself*; but it will equally have the effect of excluding his confession, if there be good reason to believe that it has come to his knowledge, and has influenced his conduct. Thus, where a superior clerk in the post-office said to the wife of a postman, who was in custody for opening and detaining a letter, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;" the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated to him the substance of this statement.<sup>5</sup> So, where in a case of murder, Government had pub-

<sup>1</sup> See *R. v. Reason*, 12 Cox, 228, per Keating, J.; *R. v. Jones*, id. 241.

<sup>2</sup> *R. v. Baldry*, 2 Den. 430. There, a policeman, who had a prisoner in custody on a charge of felony, said to him, "You need not say anything to criminate yourself; what you say will be taken down and used as evidence against you." The court held that a confession subsequently made was admissible. Notwithstanding this decision, some of the Irish Judges appear to be still inclined to follow the former *mala praxis*. *R. v. Toole*, 7 Cox, 244, *sed qu.*

<sup>3</sup> *R. v. Shepherd*, 7 C. & P. 579, per Gaselee, J.; *R. v. Enoch*, 5 C. & P. 539, per Park, J.; *R. v. Wood*, Ir. Cir. R. 597, per Crampton, J.; *R. v. Laughier*, 2 C. & Kir. 225, per Pollock, C. B.; *R. v. Bate*, 11 Cox, 686, per Montague Smith, J.

<sup>4</sup> *R. v. Reeve*, 1 Law Rep., C. C. 362; 41 L. J., M. C. 92; 12 Cox, 179, S. C.; *R. v. Holmes*, 1 C. & Kir. 248, per Rolfe, B.; *R. v. Court*, 7 C. & P. 486, per Littledale, J.; *R. v. Harris*, 1 Moo. C. C. 341; *R. v. Baldry*, 2 Den. 442, *R. v. Jarvis*, 1 Law Rep., C. C. 96; 37 L. J., M. C. 1, S. C.

<sup>5</sup> *R. v. Harding*, 1 Arm. M. & O. 340.

lished a handbill, offering pardon to any one of the offenders, except the person who struck the blow, who should give such information as would lead to the conviction of his accomplices; and it appeared that the prisoner was aware of this offer, and was induced by it to make a confession, the court held that what he said could not be given in evidence.<sup>1</sup>

§ 886.<sup>2</sup> The rule that the confession must be voluntary, is § 809 equally applicable to cases where the prisoner has made a *statement during the preliminary inquiry before the magistrate*. The practice of subjecting the accused to a compulsory examination, and even of putting him to the torture, was familiar to the Roman law,<sup>3</sup> and both these modes of proceeding were legal in Scotland so late as the reign of Queen Anne.<sup>4</sup> In England, too, down to the reign of Charles the First, the rack was occasionally employed as an apt engine for wringing truth from the victims of the Star Chamber and the High Commission Court;<sup>5</sup> and even Lord Coke, till he became a patriot, and saw political offences with the eyes of a leader of the Opposition, was prepared to wink at, if not to justify, its use;<sup>6</sup> while Lord Bacon, to his eternal infamy, did not hesitate, as Attorney-General, to superintend, in person, the torture of an aged clergyman.<sup>7</sup> However, in the year 1628, on the trial of Felton for the murder of the Duke of Buckingham,—the evidence being amply sufficient to ensure a conviction without the use of torture, and the prisoner threatening, that were he put to the rack, he might possibly accuse Bishop Laud, or some other of the lords of the council as being accessories to the fact,—the judges came to an unanimous

<sup>1</sup> R. v. Boswell, C. & Marsh. 584, per Cresswell, J. See R. v. Dingley, 1 C. & Kir. 637; and R. v. Blackburn, 6 Cox, 333.

<sup>2</sup> Gr. Ev. § 224, in part as to first six lines.

<sup>3</sup> See B. Carpz. Pract. Rer. Cri., Pars iii., Quæst. 113, per tot.

<sup>4</sup> The Act of 7 A., c. 21, s. 5, abolished the use of torture in Scotland. See 2 M'Douall, Inst. 660. For instances of the application of torture beyond the Tweed, see 6 How. St. Tr. 1217—1222, and 10 id. 687, 691, 728—747, 751—758.

<sup>5</sup> Campion's case, cited by Weston, B., in R. v. Cellier, 7 How. St. Tr. 1205; Peacham's case, 2 How. St. Tr. 871.

<sup>6</sup> See Lady Shrewsbury's case, 2 How. St. Tr. 773, 774, n. a.

<sup>7</sup> Peacham's case, 2 How. St. Tr. 870, 871, 876. See the masterly Life of Ld. Bacon, in Ld. Campbell's Lives of the Chanc., 2nd vol., 339—341.

opinion, that "no such punishment as torture by the rack was known or allowed by our law;"<sup>1</sup> and since that decision no attempt has been made to revive this atrocious practice.<sup>2</sup>

§ 887. Though torture was thus formally abolished before the middle of the seventeenth century, it was not till after the lapse of many years that the common law doctrine, *nemo tenetur prodere seipsum*, was fully recognised, or at least was interpreted to mean,—as it does in the present day,—that all confessions should be strictly *voluntary*; for no man can read the cases reported among the State trials, without observing, that, up to a comparatively modern date, persons accused of flagrant or political offences were earnestly pressed, in their preliminary examinations, to acknowledge their guilt; while, at their trial, recourse was frequently had to every artifice of cross-examination, in order to entrap them into a confession, or to detect some falsehood or inconsistency in the statements which they had made in support of their innocence. This practice, which still continues in France,<sup>3</sup> and in other countries on the continent of Europe, and which certainly is no mean instrument for the discovery of truth, has been regarded both in this country and in America, during the last century, as savouring of unfairness and oppression, and has consequently been discontinued; and, though assuredly few Englishmen would wish to see this mode of proceeding re-established in all its harshness and vigour in our criminal courts, most sensible men will probably now consider that false sentiments of humanity and fair dealing have been carried much too far in an opposite direction.

§ 888. The first Acts which regulated the examination of prisoners before the magistrates, were passed in the reign of Queen Mary;<sup>4</sup> and these statutes, the principles of which have been

<sup>1</sup> *R. v. Felton*, 3 How. St. Tr. 371.

<sup>2</sup> In *R. v. Cellier*, 7 How. St. Tr. 1205, Weston, B., told the jury, that no person had suffered torture in England since *Campion the Jesuit*, who was put to the rack in the 20th year of the reign of Queen Elizabeth. But this is a strange mistake.

<sup>3</sup> See Comments on the case of the *Duc de Praslin*, in 7 *Law Rev. Art. vii.*

<sup>4</sup> 1 & 2 Ph. & M., c. 13; 2 & 3 Ph. & M., c. 10; extended to Ireland by 10 C. 1, c. 18.

adopted in several of the United States,<sup>1</sup> were followed in England by the Act of 7 G. 4, c. 64, and in Ireland by the corresponding Act of 9 G. 4, c. 54. The statutes, however, which now *define the course of practice* in either country are 11 & 12 V., c. 42, and 14 & 15 V., c. 93.<sup>2</sup> The first of these two Acts, which applies to

<sup>1</sup> See N. York Cr. Code, Part 4, tit. 3, c. 7, §§ 195—199; Bellinger's case, 8 Wend. 595, 599; Elmer's Laws of New Jersey, p. 450, § 6; Laws of Alabama (Toulmin's Dig.), tit. 17, ch. 3, § 2, p. 219; Laws of Tennessee (Caruthers and Nicholson's Dig.), p. 426; N. Carolina Rev. Stat., ch. 35, § 1; Laws of Mississippi (Alden and Von Hoesen's Dig.), c. 70, § 5, p. 532; Laws of Delaware (Rev. Code of 1829), p. 63; Brevard's Laws of S. Carolina, vol. i., p. 460; Laws of Missouri (Revision of 1835), p. 476; Laws of Michigan Territory, p. 215. See, also, Mass. Rev. Stat., ch. 85, § 25; Resp. v. McCarty, 2 Dall. 87, per M'Kean, C. J.

<sup>2</sup> 14 & 15 V., c. 93, relates to Ireland, and enacts, in § 14, clause 2, that, "Whenever the examination of the witnesses on the part of the prosecution shall have been completed, the justice or one of the justices present shall, without requiring the attendance of the witnesses, read or cause to be read to the person accused the several depositions, and then take down in writing the statement (Ac.) of such person, having first cautioned him that he is not obliged to say anything unless he desires to do so, but that whatever he does say will be taken down in writing, and may be given in evidence against him on his trial; and whatever statements the said person shall then make in answer to the charge shall, when taken down in writing, be read over to him, and shall be signed by the said justice or one of the justices present, and shall be transmitted to the clerk of the Crown or peace, as the case may be, along with the depositions, and afterwards, upon the trial, may, if necessary, and if so signed, be given in evidence against the person accused, without further proof thereof, unless it shall be proved that it was not signed by the justice purporting to sign the same; but nothing herein contained shall prevent the prosecutor from giving in evidence any admission or confession, or other statement made at any time by the person accused, and which would be admissible by law as evidence against such person."

"The Form given in Sch. Ac. is as follows:—

_____ Complainant.	} Petty Sessions, district of
_____ Defendant.	

A charge having been made against C. D. before the undersigned justice that [*cause of complaint, with time and place*]; and the said charge having been read to the said C. D., and the witnesses for the prosecution having been severally examined in his presence, and the said C. D. having been first duly cautioned that he was not obliged to say anything, but that whatever he did say might be given in evidence against him upon his trial, saith as follows: [*statement of prisoner in his very words, or as nearly so as possible, and to be signed by him, if he will*].

"Taken before me this  
eighteen hundred and  
county.

day of \_\_\_\_\_ in the year  
, at \_\_\_\_\_ in said

"Signed

Justice of said county."



England, enacts, in § 18, that “*after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read, to the accused the depositions taken against him, and shall say to him these words, or words to the like effect:—‘Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you may say will be taken down in writing, and may be given in evidence against you upon your trial;’ and whatever the prisoner shall then say in answer thereto shall be taken down in writing,<sup>1</sup> and read over to him, and shall be signed by the said justice or justices, and be kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned;*” that is, “the statement of the accused” shall, together with the other documents in the case, “be delivered by the said justice or justices, or he or they shall cause the same to be delivered, to the proper officer of the court in which the trial is to be had, before or at the opening of the said court on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice, who is to preside in such court at the said trial,

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<sup>1</sup> The Form given in Sched. N to the Act is as follows:—

“——: A. B. stands charged before the undersigned [*one*] of her Majesty’s Justices of the Peace in and for the [*county*] aforesaid, this                      day of                      in the year of our Lord                      , for that he the said A. B., on                      at                      [*&c., as in the caption of the depositions*]; and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. & E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: ‘Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;’ whereupon the said A. B. saith as follows:

[*Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.*]

“Taken before me at  
above mentioned.

“A. B.  
the day and year first

“S. L.”

This form is legalised by § 28 of the Act, but is not rendered necessary.

shall order and appoint;"<sup>1</sup> "and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, *without further proof thereof*, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat, which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him on his trial, notwithstanding such promise or threat: Provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession, or other statement of the person accused or charged, *made at any time*, which by law would be admissible as evidence against such person."<sup>2</sup>

§ 889. If the above clause be read in connexion with the Form § 812 given in the schedule to the Act,<sup>3</sup> it would seem that, in order to render a prisoner's statement strictly valid as a statutory confession, the following circumstances must all have occurred. The charge must have been read to the accused;<sup>4</sup> all the witnesses must have been examined in his presence,<sup>5</sup> and the depositions read to him after the examinations were completed;<sup>6</sup> he must then, and not till then, be twice cautioned by the justice; first, generally,<sup>7</sup> and, secondly, as to the inefficiency of any promises or threats which may have been formerly held out to him;<sup>8</sup> his whole statement must next be taken down in his own words;<sup>9</sup> it must

<sup>1</sup> § 20.<sup>2</sup> § 18.<sup>3</sup> Cited in last page, n. 1.<sup>4</sup> See Sch.<sup>5</sup> See Sch., and § 17 of the Act, cited ante, § 479.<sup>6</sup> See § 18.<sup>7</sup> See § 18. As to the old law, see *R. v. Green*, 5 C. & P. 312; *R. v. Arnold*, 8 id. 621.<sup>8</sup> See first proviso in § 18. This is quite new, and is an unique specimen of absurd legislation.<sup>9</sup> See Sch.; and *R. v. Roche*, C. & Marsh. 341; *R. v. Sexton*, & *R. v. Mallett*, cited 2 Russ. C. & M. 867.

then be read to him,<sup>1</sup> and he must be pressed for his signature,<sup>2</sup> though the Act is silent as to the effect of his refusing to sign it, or even to admit its correctness; the justice must also sign the statement;<sup>3</sup> and this being done, it must be kept with the depositions, and be transmitted, together with them and certain other documents, to the court where the trial is to be had, on or before the opening of such court.<sup>4</sup>

§ 890. Notwithstanding these minute directions, it is not easy § 813 to see how the prisoner on his trial could avail himself of any neglect of them on the part of the justice, whether intentional or otherwise; for the statement transmitted, if headed in the manner pointed out by the schedule, is made evidence against the prisoner on its *mere production*, and without any proof of the mode in which it was taken down, unless it can be shown that the signature of the justice is a forgery. Whether this was the intention of the Legislature may, perhaps, be doubted; but such is the apparent effect of the language employed. It is also clear, from the last proviso which is appended to the 18th section of the Act, that any statement made by the prisoner in the magistrate's presence, before the examinations of the witnesses for the prosecution are all completed, may be proved by parol evidence, and will be admissible against him, even though no caution has been previously given.<sup>5</sup>

§ 891. The judges, as might have been expected, have felt § 814 much embarrassment in putting a sensible interpretation on these ill-drawn provisions; and the cases, as reported on the subject, are extremely unsatisfactory. In one,<sup>6</sup> Mr. Baron Alderson is made to entertain much doubt whether, in spite of the general language of the Act, it was not necessary to prove by independent

<sup>1</sup> See § 18; and 2 Russ. C. & M. 881, 882.

<sup>2</sup> See Sch.; and 2 Russ. C. & M. 881, 882; R. v. Lambe, 2 Lea. 552; R. v. Thomas, id. 637; R. v. Foster, 1 Lew. C. C. 46; R. v. Hirst, id.; R. v. Zelicote, 2 Stark. R. 483; R. v. Pressly, 3 C. & P. 183. <sup>3</sup> See § 18; and R. v. Torrant, 6 C. & P. 182.

<sup>4</sup> See §§ 18 & 20.

<sup>5</sup> See post, p. 769, n. 10, and, also, R. v. Stripp, 7 Cox, 97; Pearce & D. 648, S. C.

<sup>6</sup> R. v. Higson, 2 C. & Kir. 769.

evidence that the accused had been duly cautioned by the magistrate, although the caption of the examination contained a positive declaration to that effect. In another,<sup>1</sup> Mr. Justice Coleridge, after consulting Cresswell, J., is said to have expressed an opinion, that the first proviso in § 18 of the Act, which relates to the special caution to be given to the accused for the purpose of removing the effect of any previous threat or inducement, was a condition precedent, and that, in the absence of any proof that it had been acted upon, the statement of the prisoner was inadmissible. These dicta, however, appear to be wholly unfounded; and if the case of *R. v. Sansome* be correctly given in Mr. Cox's Criminal Law Cases,<sup>2</sup> they have been overruled. According to this reporter, the judges expressly determined in that case, that when an examination was transmitted by the committing magistrate in the statutory form, it became admissible without further proof;<sup>3</sup> and Mr. Baron Parke went so far as to assert that, in his judgment, it would be receivable in evidence, though neither of the cautions was stated to have been given. Too much reliance, however, should not be placed on this last dictum: and until the law is more clearly defined by judicial construction, it certainly will be prudent for committing magistrates not only to adopt the form set out in the schedule to the Act, but to give the prisoner in all cases the second caution as well as the first.<sup>4</sup>

§ 892. Although a written examination, if it purport to be taken § 815 in conformity with the Act, and to be signed by the committing magistrate, is in strictness admissible without proof, it may still be advisable in serious cases, as a matter of caution, to call either the justice or the clerk, so that it may clearly appear that the proceedings have been conducted in the proper manner.<sup>5</sup> Indeed, this course may become necessary, if the document has not been drawn out in the form given in the schedule, or if it contains

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<sup>1</sup> *R. v. Kimber*, 3 Cox, 223.

<sup>2</sup> 4 Cox, 203, 207. See S. C. as reported in 3 C. & Kir. 332.

<sup>3</sup> In 1 Den. 545, where the same case is reported, the above ruling will not be found; and this is the more remarkable as Mr. Denison was himself counsel in the cause.

<sup>4</sup> *R. v. Sansome*, 1 Den. 545.

<sup>5</sup> See *R. v. Pikesley*, 9 C. & P. 124; *R. v. Wilshaw*, C. & Marsh. 145.

erasure or interlineations which require explanation.<sup>1</sup> If, too, the prisoner has not signed his name or mark to the paper, some witness, who was present at the inquiry, should, in prudence, be forthcoming to speak to its identity, and to prove that it was read over to the accused, and assented to by him.<sup>2</sup> It would seem to be further necessary to the validity of an examination as evidence per se, that it should appear on the face of the document that it was taken while the prisoner was under examination on a charge of felony or misdemeanor, or of suspicion of one of those crimes, and that the justices signing it were acting as justices pursuant to statute.<sup>3</sup> Whether these facts must appear by a separate caption is a point which is not yet determined. The form in the schedule gives a separate caption, but that form, though legalised, is not rendered necessary by the Act;<sup>4</sup> and under the old law, provided the examination was written on the same paper as the depositions, the heading at the commencement was held to apply to all the statements contained in the document.<sup>5</sup> In this respect the rule agreed with that which governs examinations taken under the Poor Law Acts; for it is not necessary,—as was once supposed,<sup>6</sup>—that such examinations should have distinct captions, but it will suffice to state in the first caption the names of all the witnesses.<sup>7</sup>

§ 893. As the admissibility of statutory examinations without proof rests on the presumption that the justices have done their duty, it seems to follow that no evidence can be received tending to *contradict* or *vary* the statements contained in the documents as returned. This was the law before the Act under discussion was passed,<sup>8</sup> and that Act does not appear to have introduced any change in

<sup>1</sup> See *R. v. Brogan*, cited 2 Russ. C. & M. 887; *R. v. Dwyers*, id. n. p.

<sup>2</sup> See *R. v. Reading*, 7 C. & P. 649; *R. v. Hearn*, C. & Marsh. 109; *R. v. Hopes*, 7 C. & P. 136; 1 M. & Rob. 396, n., S. C.; *R. v. Haines*, 2 Russ. C. & M. 886.

<sup>3</sup> See *R. v. Tarrant*, 6 C. & P. 182.

<sup>4</sup> § 28 of the Act.

<sup>5</sup> *R. v. Johnson*, 2 C. & Kir. 355, per Alderson, B.; *R. v. Young*, 3 id. 106.

<sup>6</sup> *R. v. Ratcliffe Culey*, 2 Sess. Cas. 352.

<sup>7</sup> *R. v. St. Michael's, Coventry*, 12 Q. B. 96; 3 Sess. Cas. 260, S. C.

<sup>8</sup> *R. v. Walter*, 7 C. & P. 267; *R. v. Morse*, 8 C. & P. 605.

the practice.<sup>1</sup> Whether this presumption is of so conclusive a character as to exclude all parol evidence, which is tendered with the view of *adding* to the written examination, is a question of doubt and difficulty; but as the Act renders it incumbent on the justice, not only to reduce to writing so much of the prisoner's examination as may be *material*,<sup>2</sup> but to take down his *whole* statement,<sup>3</sup> it would seem right to hold that he had done so, and that no parol evidence of any additional statement *made at the same time* could be received.<sup>4</sup>

§ 894. If however, parol evidence of such additional state- § 817  
ment be admissible on the part of the prosecution, the prisoner, *a fortiori*, would seem entitled to pray it in aid of his defence; and this view of the law is sanctioned, not only by the case of *Venafrá v. Johnson*,<sup>5</sup> but also by the authority of Mr. Starkie and Mr. Phillipps; the latter of whom, while he denies the right of the Crown, admits the right of the accused, to produce such evidence.<sup>6</sup> Whatever may be the correct rule upon this particular point, it is clear, from the last proviso which is appended to § 18 of the Act, that<sup>7</sup> a written examination will not exclude parol evidence, either of an extra-judicial confession, previously or subsequently made;<sup>8</sup> or of a statement made before the justice on a former investigation, and not incorporated in the examination returned;<sup>9</sup> or of anything incidentally said by the prisoner while the witnesses were deposing against him, even though it were addressed to the magistrate himself,<sup>10</sup> and no caution had

<sup>1</sup> *R. v. Bond*, 4 Cox, 236.

<sup>2</sup> This was the language of the old law. See 7 G. 4, c. 64, § 3.

<sup>3</sup> See 11 & 12 V., c. 42, § 18, and Sch. N., cited ante, § 888.

<sup>4</sup> See, however, *Rowland v. Ashby*, Ry. & M. 232; *R. v. Harris*, 1 Moo. C. C. 338; *Leach v. Simpson*, 5 M. & W. 312, per Parke, B.

<sup>5</sup> 1 M. & Rob. 316, per Gaselee, J., after consulting the judges of C. P.

<sup>6</sup> 2 Ph. Ev. 82—86; 3 St. Ev. 787.

<sup>7</sup> Gr. Ev. § 227, in part.

<sup>8</sup> *R. v. Carty*, Ridgway's R. 73, cited in Joy on Conf. 97, and McNally, Ev. 45; *R. v. Reason*, 16 How. St. Tr. 35, per Eyre, J.

<sup>9</sup> *R. v. Wilkinson*, 8 C. & P. 662, per Littleale, J., and Parke, B.; *R. v. Bond*, 4 Cox, 231; 1 Den. 517, S. C.

<sup>10</sup> *R. v. Bond*, 4 Cox, 231; 1 Den. 517; 3 C. & Kir. 337, n., S. C.; *R. v. Spilsbury*, 7 C. & P. 187, per Coleridge, J.; *R. v. Johnson*, per Parke, B.

been previously given.<sup>1</sup> So, if it can be proved that the prisoner's examination was not reduced to writing, parol evidence of what he said before the magistrates will be received;<sup>2</sup> though the presumption that all things were done as the law requires, renders it necessary for the Crown to give clear evidence on this point;<sup>3</sup> and on more than one occasion the judges seem to have thought it necessary that the magistrate or his clerk should be called to prove the negative fact.<sup>4</sup> Again, if the written examination be shown to have been lost,<sup>5</sup> or if it be wholly inadmissible under the statute by reason of irregularity, parol evidence will be received to prove what the prisoner voluntarily disclosed;<sup>6</sup> and in this last event of the examination being rejected for informality, it may still be used, either as a contemporaneous writing, to refresh the memory of the witness who wrote it,<sup>7</sup> or if it be signed by the prisoner, it will be receivable at common law as his confession, the signature being first proved, and it being shown that he knew what it contained.<sup>8</sup>

§ 895. One species of irregularity, however, in excluding the examination as evidence *per se*, prevents its being used to refresh the writer's memory, and shuts out all parol testimony of what

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*R. v. Moore*, per *id.*; *R. v. Hooper*, per *Erskine, J.*; all cited in 2 Russ. C. & M. 879. But see *R. v. Weller*, 2 C. & Kir. 223, per *Platt, B.* Sed *qu.* as to this case.

<sup>1</sup> *R. v. Stripp*, 7 Cox, 97; *Pearce & D.* 648, S. C.

<sup>2</sup> *R. v. Hall*, cited by *Grose, J.*, in *R. v. Lamb*, 2 Lea. 559; *R. v. Huet*, 2 Lea. 821.

<sup>3</sup> *R. v. Fearshire*, 1 Lea. 202; *R. v. Jacobs*, *id.* 309; *R. v. Hinxman*, per *Ashhurst, J.*, and *R. v. Fisher*, per *Heath, J.*, cited *id.* 310, 311, n.; *R. v. M'Govern*, 5 Cox, 506.

<sup>4</sup> *R. v. Packer*, per *Parke, J.*, and *R. v. Phillips*, per *Bosanquet, J.*, both cited 2 Russ. C. & M. 876, n. p; *Phillips v. Winburn*, 4 C. & P. 273, per *Tindal, C. J.*

<sup>5</sup> *R. v. Reason*, 16 How. St. Tr. 35, per *Eyre, J.*

<sup>6</sup> *R. v. Reed*, M. & M. 403, per *Tindal, C. J.*

<sup>7</sup> *R. v. Laver*, 16 How. St. Tr. 214, 215, per *Pratt, C. J.*; *R. v. Watson*, 3 C. & Kir. 111; *R. v. Watkins*, per *Bosanquet, J.*, cited n. b, 4 C. & P. 550; *R. v. Tarrant*, 6 C. & P. 182, per *Patteson, J.*; *R. v. Pressly*, *id.* 183, per *id.*; *R. v. Dewhurst*, and *R. v. Hirst*, per *Bayley, J.*; 1 Lew. C. C. 47; *R. v. Jones*, Carr. Cr. L. 13, per *Bayley* and *Gaselee, Js.*, and *Vaughan, B.*; 1 Lew. C. C. 47, n.; 4 C. & P. 550, n., S. C.; *R. v. Bell*, 5 C. & P. 162, per *Gaselee, J.*, and *Ld. Tenterden*.

<sup>8</sup> See *R. v. Sansome*, 4 Cox, 203 1 Den. 545; 3 C. & Kir. 332, S. C.

was said on the same occasion. The irregularity in question is where the *examination purports to have been taken upon oath*.<sup>1</sup> This rule, which is supported by too many authorities to admit of dispute, rests upon two principles of law, both of which are of very questionable policy, as applied to the particular case under discussion. The first is a principle which has been several times mentioned above, namely, that the confession of a prisoner must be voluntary: and it is contended, that a statement made under oath is not so. This is certainly true in one sense, though not in that in which it is used by the advocates for exclusion. A confession not voluntary is excluded. Why? because it may be untrue. A confession made upon oath cannot be rejected on this ground; since it is absurd to contend, that an oath, which in all other cases is rightly considered as the most effectual tests of truth, should, if taken by a prisoner, be regarded as an inducement to falsehood. But then, it is urged, *nemo tenetur prodere seipsum*; a prisoner should not be compelled to criminate himself. Admitted; but what then? A prisoner, though sworn, is no more bound to criminate himself, than if he were simply interrogated without any oath being administered to him. He has still full liberty to decline to make any explanation or declaration whatever: though if he does consent to answer the questions put to him, he may, perhaps, incur the penalties of perjury should he knowingly utter what is false.<sup>2</sup> "But a friendless accused is not aware of the law in his favour." This may be so; but in what other case is a party at liberty to set up his ignorance of the law? If the maxim of the common law, *ignorantia legis neminem excusat*, be sound, as it unquestionably is; and if, consequently, the defence of acting in ignorance cannot protect an offender even from punishment; on what principle of justice is the accused entitled to say, "I confessed my crime, and have sworn that my

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<sup>1</sup> R. v. Smith, 1 Stark. R. 242, per Le Blanc, J.; R. v. Davis, 6 C. & P. 177, per Gurney, B.; R. v. Bentley, id. 148, per id.; R. v. Rivers, 7 C. & P. 177, per Park, J.; R. v. Owen, 9 C. & P. 238, per Gurney, B.; R. v. Pikesley, id. 124, per Parke, B., and Bosanquet, J.; R. v. Wheeley, 8 C. & P. 250, per Alderson, B.

<sup>2</sup> This, however, seems doubtful, as the magistrate has no authority to administer such an oath.



statement is true; but you, the jury, must not hear what I said, because I was not aware of the existence of a rule of law, which would have expressly justified me in holding my peace"? If the practice of examining prisoners on oath be deemed inquisitorial and harsh, let it be discountenanced, not by rejecting a confession so obtained, but by prohibiting justices from acting in this manner, or even by rendering them liable to a penalty in case of disobedience.

§ 896. It may be thought, at first view, that if this change were effected, the practical result would be the same; but this is not the case; since, at present, not only are all confessions made upon oath rejected, but all those *which purport to be so made*;<sup>1</sup> and this leads us to the second principle of law, on which the rule under discussion rests. That principle is, that as the justices, in discharge of their duty, ought to make a true return of what took place before them, the court will presume that they have thus acted; and, therefore, will not admit parol evidence to vary or contradict the written document so returned. Now, the fallacy of this reasoning is obvious. In the first place, the presumption, *omnia rite esse acta*, is not conclusive in ordinary cases, and should not be so in this; and next, even supposing that it should, it does not apply. The duty of the justice is two-fold: first, to examine the prisoner without administering an oath to him;<sup>2</sup> and, secondly, to make a true return of his statement. If, then, an examination be returned, which purports to have been taken on oath, the presumption that this return is true is at least counterbalanced by the opposite presumption, that the justice has discharged his duty by not swearing the prisoner; and the result is, that parol evidence should be received, in order to ascertain which presumption is in accordance with the fact. The principle, that written documents shall not be varied or contradicted by parol testimony, may apply to the body of the examination, which is taken down by the justice or his clerk, and is expressly assented to by the accused; but it should not extend to the mere formal heading or conclusion of the examination, which is not, or at least need not be, read over to the

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<sup>1</sup> See cases cited ante, p. 771, n. <sup>1</sup>.

<sup>2</sup> B. N. P. 242.

prisoner, or admitted to be correct by him; and a mis-statement in which may, and, in fact, notoriously does, often arise from the inadvertence or carelessness of the magistrate or his clerk. If the justice were liable to a penalty, as above suggested, for taking a prisoner's confession on oath, he would clearly be entitled, if sued or prosecuted for such penalty, to show that, though the examination purported on its face to have been taken on oath, the prisoner was not in fact sworn; and no real danger could be apprehended, but on the contrary much benefit would accrue to the administration of criminal justice, if a similar course of proceeding were allowed, when the question was whether a confession was receivable or not. However, as before stated, the authorities in favour of rejecting examinations which purport to be upon oath are so numerous and consistent, that, without the aid of the Legislature, little hope can be entertained that a more satisfactory rule will be adopted in practice.<sup>1</sup>

§ 897. Where a prisoner, on being mistaken for a witness, was partially examined upon oath, but, the mistake being discovered, the deposition was destroyed,—a subsequent statement made by him, after due caution from the magistrate, was held to be clearly admissible.<sup>2</sup> And, indeed, the rule excluding sworn confessions seems strictly confined, at common law, to the case of a statement, made by the party upon oath, while a *prisoner under examination* respecting the criminal charge.<sup>3</sup> It is true that one or two decisions by Mr. Baron Gurney might be cited, which seem to extend the rule somewhat further, and to render inadmissible confessions made on oaths to magistrates or coroners by parties, who, after being examined *as witnesses*, have themselves been committed for trial;<sup>4</sup> but these decisions have been overruled by subsequent cases.<sup>5</sup>

<sup>1</sup> See cases cited ante, p. 771, n. <sup>1</sup>. See, also, No. 57 of Law Mag. Vol. 28, pp. 13—19, where the anomalies in the present law of confessions are amusingly exposed.

<sup>2</sup> *R. v. Webb*, 4 C. & P. 564, per Garrow, B.

<sup>3</sup> See Joy on Conf. 62—68.

<sup>4</sup> *R. v. Lewis*, 6 C. & P. 161, per Gurney, B.; *R. v. Davis*, id. 177, per id.; *R. v. Owen*, 9 C. & P. 83, per id. See, also, n. *w*, in 2 Russ. C. & M. 860; and *R. v. M'Hugh*, 7 Cox, 483, per Ir. Cr. Ct. of App., Pennefather, B., diss.

<sup>5</sup> See *R. v. Gillis*, 17 Ir. Law R., N. S. 534, per O'Hagan, J.; *R. v. Coote*, (3641)

§ 898. Thus, the judges have held, that, on an indictment for § 821 forging a bill of exchange, depositions of the prisoner, which had been taken on oath before commissioners of bankruptcy, *after* the prisoner had been charged before the mayor with forging the bill, were admissible against him;<sup>1</sup> and in another case, where a bankrupt had been examined before a commissioner touching some matter irrespective of his trade dealings, and had not objected to answer the questions put, his examination was held to be admissible evidence against him on a subsequent criminal charge.<sup>2</sup> So, where a trader was indicted for obtaining property on credit, under the false pretence of dealing in the ordinary way of his trade, within four months before his liquidation,<sup>3</sup> his examination, taken in liquidation under § 97 of the Bankruptcy Act, 1869,<sup>4</sup> was admitted in evidence against him.<sup>5</sup> So, on a charge of arson, depositions made by the prisoner when under examination as a witness respecting the origin of the fire, have been read against him.<sup>6</sup>

§ 899. Again, on the trial of an indictment for conspiracy, the § 821 answers in Chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, have been received.<sup>7</sup> An affidavit, too, has been given in evidence against a prisoner, which was sworn by him in a suit in Doctors' Commons;<sup>8</sup> and depositions made by prisoners, when examined as witnesses against other persons on criminal charges, have several times been

4 Law Rep., P. C. 605, 606, per Sir R. Collier; 42 L. J., P. C. 47, 48; 12 Cox, 562, S. C.

<sup>1</sup> R. v. Wheeler, 2 Moo. C. C. 45; 2 Lew. C. C. 157, S. C. See R. v. Cherry, 12 Cox, 32.

<sup>2</sup> R. v. Sloggett, Pearce & D. 656; 7 Cox, 139, S. C. See, also, R. v. Scott, 25 L. J., M. C. 128; and R. v. Hillam, 12 Cox, 174.

<sup>3</sup> Contrary to § 11 of the Debtors Act, 1869, 32 & 33 V., c. 62.

<sup>4</sup> 32 & 33 V., c. 71.

<sup>5</sup> R. v. Widdop, 42 L. J., M. C. 9; 2 Law Rep., C. C. 3; 12 Cox, 251, S. C.

<sup>6</sup> R. v. Coote, 4 Law Rep., P. C. 599; 42 L. J., P. C. 45; 12 Cox, 557, S. C.

<sup>7</sup> R. v. Goldshede, 1 C. & Kir. 657, per Ld. Denman; R. v. Highfield, per Vaughan, B., cited 2 Russ. C. & M. 859.

<sup>8</sup> R. v. Walker, per Ld. Ellenborough, cited by Gurney, B., in 6 C. & P. 162.

admitted against themselves.<sup>1</sup> Nay, in one case, the very point decided by Mr. Baron Gurney was distinctly overruled by Chief Justice Cockburn; and a deposition was admitted against a prisoner, who had made it before the justices while under examination as a witness, and who, in consequence of its self-criminating character, had been committed to take his trial.<sup>2</sup> So, upon a trial for manslaughter, the prisoner's deposition on oath, taken by the coroner upon the inquest, has been admitted in evidence against him.<sup>3</sup> So, the testimony, given by a prisoner before a committee of the House of Commons, has been read against him on a criminal trial;<sup>4</sup> though this case is of little authority on the subject under discussion, as the evidence could not then have been given on oath.<sup>5</sup> The case of *R. v. Britton*,<sup>6</sup> which is sometimes cited as a decision conflicting with the above proposition, is in fact no hostile authority, as the only question there determined was, that on an indictment against a bankrupt for not disclosing his effects under the commission, his balance-sheet, which was only admissible in the event of the commission being valid, could not be given in evidence to prove the petitioning creditor's debt as a part of the commission.<sup>7</sup> On the whole it seems clear, that if a prisoner, on being examined as a witness, has consented to answer questions, to which, he might have demurred as tending to criminate himself, and which, therefore, he was not bound to answer, his statement will be deemed voluntary, and, as such, may be subsequently used against himself for all purposes,<sup>8</sup> *unless* he be protected by the special language of some statute.<sup>9</sup>

<sup>1</sup> *R. v. Haworth*, 4 C. & P. 254, per Parke, J.; *R. v. Tubby*, 5 C. & P. 530, per Vaughan, B.; *R. v. Braynell*, 4 Cox, 402.

<sup>2</sup> *R. v. Chidley & Cummins*, 8 Cox, 365. See, also, *R. v. Colmer*, 9 Cox, 506, per Martin, B.

<sup>3</sup> *R. v. Bateman*, 4 Fost. & Fin. 1068, per Martin, B., and Willes, J.

<sup>4</sup> *R. v. Mercer*, 2 Stark. R. 366, per Abbott, J.

<sup>5</sup> See per Ld. Tenterden, in *R. v. Gilham*, 1 Moo. C. C. 203.

<sup>6</sup> 1 M. & Rob. 297, per Patteson and Alderson, J.

<sup>7</sup> Per Patteson, J., explaining that decision in *R. v. Wheeler*, 2 Moo. C. C. 51.

<sup>8</sup> But see *R. v. Gillis*, 17 Ir. Law R., N. S. 512; 11 Cox, 69 S. C.; where a large majority of the Irish judges took a different view of the law. See *qu.*

<sup>9</sup> See post, § 1455, as to these statutes.

§ 900. Although a prisoner cannot, at common law, exclude his own confession, on the sole ground that it was made by him while a witness under oath, yet, if he can prove that, when questions tending to criminate him were put, he had claimed the protection of the court, and had still been illegally compelled to answer, his answers cannot be given in evidence against himself.<sup>1</sup> Testimony so obtained is excluded, not, as it seems, because it may possibly be untrue, but because the right of the witness to be silent has been infringed; and it is deemed expedient, on grounds of public policy, to uphold the broad legal maxim, that no man shall be forced to criminate himself.<sup>2</sup>

§ 901. Notwithstanding that the statutes which prescribe the duty of coroners contain no provision for taking the examination of the accused, but simply enact, that every coroner shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall certify and subscribe the same, and deliver it to the officer of the court in which the trial is to be,<sup>3</sup>—it seems on several occasions to have been assumed, that the coroner has the same authority to take the examination of a prisoner as a magistrate.<sup>4</sup>

§ 902.<sup>5</sup> When, in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed

<sup>1</sup> R. v. Garbett, 1 Den. 236; 2 C. & Kir. 474, S. C. See post, § 1453, et seq., as to what questions a witness may refuse to answer.

<sup>2</sup> R. v. Garbett, 1 Den. 257, per Alderson, B. But see cases cited in § 898, ante.

<sup>3</sup> 7 G. 4, c. 64, §§ 4 & 6; 9 G. 4, c. 54, §§ 4 & 6, Ir. It may be doubted whether § 4 of 7 G. 4, c. 64, be not now repealed by § 34 of 11 & 12 V., c. 42.

<sup>4</sup> R. v. Reid, M. & M. 403, cor. Tindal, C. J.; R. v. Roche, C. & Marsh. 341, cor. Ld. Denman; Brogan's case, 2 Russ. C. & M. 874, cor. Ld. Lyndhurst.

<sup>5</sup> Gr. Ev. § 231, in great part.

by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there.<sup>1</sup> Lord Eldon has laid down the rule somewhat more strictly, saying, in Harvey's case,<sup>2</sup> that, where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it. But the sounder doctrine seems to be, that so much of the confession as relates *distinctly* to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false.<sup>3</sup>

§ 903.<sup>4</sup> If the *prisoner himself delivers up the goods stolen*, the fact that this was done upon inducements to confess held out by persons in authority, will afford no ground for rejecting his declarations, contemporaneous with the act of delivery, and explanatory of its object, though they may amount to a confession of guilt.<sup>5</sup> But whatever he may have said at the same time, not qualifying or explaining the act of delivery, must be rejected. And if,—notwithstanding the prisoner's confession, thus improperly induced, and any acts done by him in furtherance of the discovery,—*the search* for the property or person in question be *ineffectual*, no proof of either the confession or the acts can be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon; and the acts done under the same influence, not being confirmed by the finding of the property

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<sup>1</sup> Ph. Ev. 411; R. v. Warickshall, 1 Lea. 263; R. v. Mosey, id. 265, n., per Buller, J., and Perryn, B.; R. v. Lockhart, id. 386; R. v. Gould, 9 C. & P. 364, per Tindal, C. J., and Parke, B.; R. v. Thurtell, cited Joy on Conf. 84; R. v. Cain, 1 Cr. & D., C. C. 37, per Torrens, J.; Com. v. Knapp, 9 Pick. 496, 511.

<sup>2</sup> 2 East, P. C. 658.

<sup>3</sup> R. v. Butcher, 1 Lea. 265, n.; and see the cases cited above, n. <sup>1</sup>.

<sup>4</sup> Gr. Ev. § 232, in part.

<sup>5</sup> R. v. Griffin, R. & R. 151; R. v. Jones, id. 152.

or person, are open to the same objection. The influence which may produce a groundless confession may also produce groundless conduct.<sup>1</sup>

§ 904. A prisoner is not liable to be affected by the *confessions of his accomplices*;<sup>2</sup> and so strictly has this rule been enforced, that where a person was indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft, was held by all the judges to be no evidence of that fact as against the receiver;<sup>3</sup> and the decision, it seems, would be the same, if both parties were indicted together, and the principal were to plead guilty.<sup>4</sup>

§ 905.<sup>5</sup> The same doctrine prevails in cases of *agency*. In general, no person is answerable criminally for the acts of his servants or agents, whether he be the prosecutor or the accused, unless a criminal design be brought home to him.<sup>6</sup> The act of the agent or servant may be shown in evidence, as proof that such an act was done; for a fact must be established by the same evidence, whether it be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the principal may be affected by the fact, when so established. For though the wrongful or fraudulent act of the agent may involve his principal civilly,<sup>7</sup> it cannot

<sup>1</sup> R. v. Jenkins, R. & R. 492.

<sup>2</sup> So is the Roman law. "Confessio unius non probat in præjudicium alterius, quia aliàs esset in manu confitentis dicere quod vellet, et sic jus alteri quesitum auferre, quando omninò jura prohibent; etiãmsi talis-confitens esset omni exceptione major. Sed limitabis, quando inter partes convenit parere confessioni et dicto unius alterius." 1 Masc. de Prob., Concl. 486, p. 409. See ante, §§ 593, 594.

<sup>3</sup> R. v. Turner, 1 Moo. C. C. 347.

<sup>4</sup> Id. 348, citing an anonymous decision of Wood, B.

<sup>5</sup> Gr. Ev. § 234, in great part.

<sup>6</sup> See Cooper v. Slade, 6 H. of L. Cas. 746, 793, 794, per Ld. Wensleydale.

<sup>7</sup> Barwick v. Eng. Jt. Stock Bk., 2 Law Rep., Ex. 259, per Ex. Ch.; 36 L. J., Ex. 174, S. C.; Proudfoot v. Montefiore, 2 Law Rep., Q. B. 511; 8 B. & S. 510, S. C.; Moore v. Metrop. Ry. Co., 8 Law Rep., Q. B. 36; Mackay v. Com. Bk. of New Brunswick, 43 L. J., P. C. 31; 5 Law Rep., P. C. 394, S. C.; Swire v. Francis, 47 L. J., P. C. 18; Burmah Trading Corp. Lim. v. Mirza Mahomed Ally, &c., L. R., 5 Ind. Ap. 130. See Ld. Bolinbroke v. Local Board of Health of Swindon, 34 L. J., C. P. 287. Shaw v. Port Philip Gold Min. Co., 53 L. J., Q. B. 369; L. R., 13 Q. B. D. 103, S. C.

convict him of a crime, unless further proof be given that the principal has directed, or, at least, assented to such act.<sup>1</sup> Where it was proposed to show that an agent of the prosecutor, not called as a witness, had offered a bribe to a witness, who also was not called, the evidence was held inadmissible; though the general doctrine, as above stated, was recognised.<sup>2</sup>

§ 906. The rule thus generally laid down is open to an apparent § 827 exception in the case of the proprietor of a newspaper, who is, *prima facie*, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge. But Lord Tenterden considered this case as falling strictly within the principle of the rule; for “surely,” said he, “a person who derives profit from, and furnishes means for carrying on, the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was individually concerned in the particular publication.”<sup>3</sup> Yet even here the defendant may prove, if he can, that the publication was made by his servant without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part.<sup>4</sup>

§ 907. It remains only to be observed, that confessions, like § 828 admissions, may be inferred from the *conduct* of the prisoner, and from his *silent acquiescence* in the statements of others, made in his presence, respecting himself;<sup>5</sup> provided they were not made either before a magistrate, when the prisoner, from a sense of de-

<sup>1</sup> *Ld. Melville's case*, 29 How. St. Tr. 764; the *Queen's case*, 2 B. & B. 306, 307; ante, § 724.

<sup>2</sup> The *Queen's case*, 2 B. & B. 302, 306—309.

<sup>3</sup> *R. v. Gutch*, M. & M. 433, 437. See, further, as to the acts of agents ante, § 115.

<sup>4</sup> 6 & 7 V.; c. 96, § 7; *R. v. Holbrook*, L. R., 3 Q. B. D. 60; S. C. on second trial, L. R., 4 Q. B. D. 42; 48 L. J., Q. B. 113; and 14 Cox, 185, S. C. See, also, *R. v. Ramsay*, 15 Cox, 231.

<sup>5</sup> *R. v. Bartlett*, 7 C. & P. 832, per Bolland, B.; *R. v. Smithies*, 5 C. & P. 332, per Gaselee and Parke, Js.; ante, §§ 809—816. See *St. Matthew*, ch. 26, vv. 60—63, and ch. 27, vv. 12—14.



corum, might have felt himself restrained from interposing, or under any other circumstances, which would naturally have prevented him from replying.<sup>1</sup> In the case of *R. v. Newman*,<sup>2</sup> it was sought to push this doctrine to an unwarrantable length. That was an information for libel, to which truth was pleaded as a justification under the Act of 6 & 7 V., c. 96, and the defendant tendered evidence to prove that the very imputations contained in the libel in question had been previously published in another work, and that the prosecutor, though well aware of that fact, had taken no steps to obtain redress. The court, however, very properly rejected the evidence, as being far too vague to be received in a court of justice as any proof of acquiescence.

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<sup>1</sup> *R. v. Appleby*, 3 Stark. R. 33, per Holroyd, J.; *Melen v. Andrews*, M. & M. 336, per Parke, B.; Joy on Conf. 77—80; ante, § 814.

<sup>2</sup> 22 L. J., Q. B. 156; 1 E. & B. 268; 3 C. & Kir. 252, S. C.

## CHAPTER XVI

## EVIDENCE EXCLUDED ON GROUNDS OF PUBLIC POLICY.

§ 908.<sup>1</sup> The law *excludes* or dispenses with some kinds of evi- § 829  
 dence *on grounds of public policy*: because it is thought that  
 greater mischiefs would probably result from requiring or permitting  
 their admission, than from wholly rejecting them. This rule of  
 law has respect, in some cases, to the person testifying, and will  
 hereafter be discussed in the chapter relating to the Competency of  
 Witnesses.<sup>2</sup> In other cases the rule applies to the matter con-  
 cerning which the witness is interrogated; and it is to this branch  
 of the rule that our attention will at present be directed.

§ 909. The *first class* of subjects which the law protects from § 830  
 disclosure, includes all *communications* between *husband and wife*.  
 "No husband," says the Legislature, "shall be compellable to dis-  
 close any communication made to him by his wife during the  
 marriage, and no wife shall be compellable to disclose any commu-  
 nication made to her by her husband during the marriage."<sup>3</sup> This  
 wise enactment rests on the obvious ground, that the admission of  
 such testimony would have a powerful tendency to disturb the peace  
 of families, to promote domestic broils, and to weaken, if not to  
 destroy, that feeling of mutual confidence, which is the most  
 endearing solace of married life. The protection is not confined to  
 cases where the communication sought to be given in evidence is of  
 a *strictly confidential* character, but the seal of the law is placed  
 upon *all* communications of whatever nature which pass between  
 husband and wife.<sup>4</sup> It extends also to cases in which the interests  
 of strangers are solely involved, as well as to those in which the  
 husband or wife is a party on the record. It is, however, limited

<sup>1</sup> Gr. Ev. § 236, in part.<sup>2</sup> Part iii. Ch. ii.<sup>3</sup> 16 & 17 V., c. 83, § 3.<sup>4</sup> See O'Connor v. Marjoribanks, 4 M. & Gr. 435.

to such matters as have been communicated "during the marriage;" and, consequently, if a man were to make the most confidential statement to a woman *before* he married her, and it were afterwards to become of importance in a civil suit to know what that statement was, the wife, on being called as a witness, and interrogated with respect to the communication, would, as it seems, be bound to disclose what she knew of the matter.

§ 910. In interpreting the rule it may become a question § 831 whether or not it be material that the relation of husband and wife should be *still subsisting* at the time when the evidence is required to be given. On the one hand, the statute speaks only of husbands and wives, and makes no reference either to widowers or widows, or to parties who have been divorced; but on the other hand, the old common law rule, which precluded husbands and wives from giving evidence for or against each other, has been construed by the judges to mean, that whatever had come to the knowledge of either party by means of the hallowed confidence which marriage inspires, could not be afterwards divulged in testimony, even though the other party were no longer living.<sup>1</sup> So, where a woman, who had been divorced by Act of Parliament, and had married another person, was offered as a witness against her former husband, to prove a contract which he had made during the coverture, Lord Alvanley held her clearly incompetent, adding, with his characteristic energy, "It never can be endured, that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved."<sup>2</sup>

§ 911.<sup>3</sup> Secondly, as regards *professional communications*, the § 832 rule is now well settled, that, where a *barrister* or *solicitor* is pro-

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<sup>1</sup> O'Connor v. Marjoribanks, 4 M. & Gr. 435; overruling Beveridge v. Minter, 1 C. & P. 364, and confirming Monroe v. Twistleton, Pea. Add. Cas. 219. See, also, Doker v. Hasler, Ry. & M. 198, per Best, C. J.

<sup>2</sup> Monroe v. Twistleton, Pea. Add. Cas. 221; explained and confirmed by Ld. Ellenborough in Aveson v. Ld. Kinnaird, 6 East, 192, 193.

<sup>3</sup> Gr. Ev. § 237, slightly.

professionally employed by a client, all communications which pass between them in the course and for the purpose of that employment, are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them, whether they be in the form of title deeds, wills,<sup>1</sup> documents, or other papers delivered, or statements made, to him, or of letters, entries, or statements, written or made by him in that capacity.<sup>2</sup> After stating the rule in this general form, it seems almost needless to add, that cases laid before counsel on behalf of a client, and the opinions of counsel thereon, stand upon precisely the same footing as other professional communications from the client to the counsel and solicitor, or to either of them, or from the counsel and solicitor, or from either of them, to the client.<sup>3</sup>

§ 912. This rule equally applies, though the solicitor be employed in the character, either of a scrivener to raise money,<sup>4</sup> or of a *conveyancer* to draw deeds of conveyance;<sup>5</sup> or though the conversation relate only to the sale of an estate, and to the amount of the bidding to be reserved.<sup>6</sup> In fact it extends to all communications between a solicitor and his client, relating to matters within the ordinary scope of a solicitor's duty.<sup>7</sup> It seems, also, that the legal

<sup>1</sup> *Doe v. James*, 2 M. & Rob. 47. There, a party claiming as devisee under a will, his solicitor was not allowed to produce the will, though it was suggested that it related also to personalty, and ought therefore to be deposited in the Eccles. Court, and to be open for public inspection.

<sup>2</sup> *Herring v. Cloberry*, 1 Phill. 91, 96; *Cromack v. Heathcote*, 2 B. & B. 4; *Greenough v. Gaskell*, 1 Myl. & K. 101. *Brougham, C.*, was assisted in this last decision by consultation with *Ld. Lyndhurst*, *Tindal, C. J.*, and *Parke, J.*, 4 B. & Ad. 876; and the case is mentioned by *Ld. Abinger*, as one in which all the authorities had been reviewed, 2 M. & W. 100. See, also, *Chant v. Brown*, 9 Hare, 790.

<sup>3</sup> *Pearse v. Pearse*, 1 De Gex & Sm. 25, per *K. Bruce, V.-C.*; *Jenkins v. Bushby*, 35 L. J., Ch. 820. See *Bargaddie Coal Co. v. Wark*, 3 Macq. Sc. Cas. H. of L. 468, 488, et seq.

<sup>4</sup> *Turquand v. Knight*, 2 M. & W. 100, per *Ld. Abinger*; *Harvey v. Clayton*, 2 Swanst. 221, n.; *Anon.*, *Skinn.* 404, per *Ld. Holt*. But here it is necessary that the solicitor should have been consulted as the party's own legal adviser, *R. v. Farley*, 2 C. & Kir. 313, 318. See post, § 923, ad fin.

<sup>5</sup> *Cromack v. Heathcote*, 2 B. & B. 4.

<sup>6</sup> *Carpmael v. Powis*, 1 Phill. 687.

<sup>7</sup> *Id.* 692, per *Ld. Lyndhurst*.

adviser cannot be asked whether the conference between him and his client was for a lawful or an unlawful purpose,<sup>1</sup> though, if from independent evidence it should clearly appear that the communication was made by the client for a criminal purpose,—as, for instance, if the solicitor was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence,—it is submitted that, on the broad principles of penal justice, he would be bound to disclose such guilty project.<sup>2</sup> Nay, it may reasonably be doubted whether the existence of an illegal purpose will not also prevent the privilege from attaching; for it is as little the duty of a solicitor to advise his client how to evade the law, as it is to contrive a positive fraud.<sup>3</sup>

§ 913. Where the *professional adviser is the party interrogated*, § 834 it is quite immaterial whether the communication relate to any litigation commenced or anticipated;<sup>4</sup> for, as Lord Chancellor

<sup>1</sup> Doe v. Harris, 5 C. & P. 594, per Parke, J.

<sup>2</sup> See R. v. Farley, 2 C. & Kir. 313; R. v. Avery, 8 C. & P. 596; Follett v. Jefferyes, 1 Sim. N. S. 17, cited post, p. 800, n. 5; Mornington v. Mornington, 2 Johns. & Hem. 697; Charlton v. Coombes, 32 L. J., Ch. 284; 4 Giff. 372, S. C., per Stuart, V.-C. In Annesley v. Ld. Anglesea, 17 How. St. Tr. 1229, Serjt. Tisdall, in argument, lays down the rule thus:—"If the witness is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of society, to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare. For this reason, I apprehend that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client." Two of the learned judges who tried that remarkable case, Bowes, C. B., and Mountney, B., expressed the same sentiments, see pp. 1240—1243. See, also, Gartside v. Outram, 26 L. J., Ch. 115, per Wood, V.-C.; and post, § 929. The Law, as stated in the text, has been recognized as sound by the Judges of Crim. App. in R. v. Cox & Railton, decided on 27th June, 1884.

<sup>3</sup> Russell v. Jackson, 9 Hare, 392, per Turner, V.-C., who observed:—"I am very much disposed to think that the existence of an illegal purpose would prevent any privilege attaching to the communications. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." See, also, Kelly v. Jackson, 13 Ir. Eq. R. 129. R. v. Cox & Railton, decided by Ct. of Crim. App., 27th June, 1884.

<sup>4</sup> Ld. Walsingham v. Goodricke, 3 Hare, 124; Desborough v. Rawlins, 3 Myl. & Cr. 515; Pearse v. Pearse, 1 De Gex & Sm. 25, per K. Bruce, V.-C.; Sawyer

Brougham observed, in a case of high authority, "If<sup>1</sup> the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous;"<sup>2</sup> and again, "This protection is not qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity, either from a client, or on his account and for his benefit in the transaction of his business,—or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client,—they are not only justified in withholding such matters, but *bound to withhold* them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness."<sup>3</sup>

§ 914.<sup>4</sup> "The foundation of this rule," adds his lordship, "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings."<sup>5</sup> If such communications were not protected, no man,—as the same learned judge remarked in another case,—would

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v. Birchmore, 3 Myl. & K. 572; Herring v. Clobery, 1 Phill. 91; Jones v. Pugh, id. 96; Greenough v. Gaskell, 1 Myl. & K. 98; Carpmael v. Powis, 9 Beav. 16, 20, per Ld. Langdale. These cases overrule Williams v. Mudie, 1 C. & P. 158; Ry. & M. 34, S. C.; Clark v. Clark, 1 M. & Rob. 3; Broad v. Pitt, M. & M. 233; 3 C. & P. 518, S. C.; and Wadsworth v. Hamshaw, 2 B. & B. 5. n.

<sup>1</sup> Gr. Ev. §§ 240 and 237.

<sup>2</sup> Greenough v. Gaskell, 1 Myl. & K. 103.

<sup>3</sup> Id. 101, 102.

<sup>4</sup> Gr. Ev. § 238, verbatim.

<sup>5</sup> Greenough v. Gaskell, 1 Myl. & K. 103; quoted with approbation in Russell v. Jackson, 9 Hare, 391, per Turner, V.-C.

dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a court, either to obtain redress, or to defend himself.<sup>1</sup>

§ 915. The rigid enforcement of this rule no doubt operates occasionally to the exclusion of truth; but if any law-reformer feels inclined to condemn the rule on this ground, he will do well to reflect on the eloquent language of the late Lord Justice Knight Bruce, who, while discussing this subject on one occasion, felicitously observed:—"Truth, like all other good things, may be loved unwisely,—may be pursued too keenly,—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."<sup>2</sup>

§ 916. Such being the reasons on which the rule is founded, its application has been confined,—with perhaps questionable strict-

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<sup>1</sup> *Bolton v. Corp. of Liverpool*, 1 Myl. & K. 94, 95. "This rule seems to be correlative with that which governs the summary jurisdiction of the courts over attorneys. In *Ex parte Aitken*, 4 B. & A. 49, that rule is laid down thus:—'Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, then the court will exercise this jurisdiction.' See, also, *Ex parte Yeatman*, 4 Dowl. 309. So where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure." Per Alderson, B., in *Turquand v. Knight*, 2 M. & W. 101. The Roman law rejected the evidence of the procurator and the advocate, in nearly the same cases as the common law; but not for the same reasons; the latter regarding the general interests of the community, as stated in the text, while the former seems to have considered such testimony as not credible, because of the identity of the legal adviser's interest, opinions, and prejudices with those of his client. 1 Masc. de Prob., Concl. 66; vol. 3, Concl. 1239; Farin. Op., Tom. 2, Tit. 6, Quæst. 60, Illat. 5, 6.

<sup>2</sup> *Pearse v. Pearse*, 1 De Gex & Sm. 28, 29.

ness,—to communications which pass between a client and his legal adviser; and the protection has not been permitted to extend to any matters communicated to other persons, though such communications were made under the terms of the closest secrecy.<sup>1</sup> Thus,<sup>2</sup> *clergymen*,<sup>3</sup> and *medical men*<sup>4</sup> are bound to disclose any information, which by acting in their professional character they have confiden-

<sup>1</sup> In *Wheeler v. Le Marchant*, L. R., 17 Ch. D. 681; and 50 L. J., Ch. 795, Jessel, M. R., thus expounded the law:—"The principle protecting confidential communications," said his lordship, "is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man, whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or prescribe for the patient, are not protected. Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication, which it is necessary to make in order to carry on the ordinary business of life, is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery, in order that that legal advice may be obtained safely and sufficiently."

<sup>2</sup> Gr. Ev. § 248, in part.

<sup>3</sup> R. v. Gilham, 1 Moo. C. C. 186.

<sup>4</sup> *Duch. of Kingston's case*, 11 Harg. St. Tr. 243; 20 How. St. Tr. 572, S. C.; *R. v. Gibbons*, 1 C. & P. 97; *Broad v. Pitt*, 3 id. 519, per Best, C. J.; *M. & M. 234*, S. C. In *Wilson v. Rastall*, 4 T. R. 760, Buller, J., much regretted that the law of privilege was not extended to those cases, in which medical persons acquired information by attending in their professional characters; and, in *Greenough v. Gaskell*, 1 Myl. & K. 103, Ld. Brougham, while stating that the rule was limited to legal advisers, observed, that "certainly it may not be very easy to discover why a like privilege has been refused to others, especially to medical advisers." By the N. York Civ. Code, § 1710, r. 4, "a licensed physician or surgeon cannot, without the consent of his patient, be examined, in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." A somewhat similar statute exists in Missouri, Rev. Code of 1835, p. 623, § 17.



tially acquired; and clerks,<sup>1</sup> bankers,<sup>2</sup> stewards,<sup>3</sup> confidential friends,<sup>4</sup> pursuivants of the Heralds' College,<sup>5</sup> and, perhaps, even licensed conveyancers,<sup>6</sup> are equally obliged to reveal what has been imparted to them in confidence, except as to matters which the principal himself would not be compelled to disclose, such as his title deeds and private papers, in a case in which he is not a party.

§ 917.<sup>7</sup> The propriety of extending the privilege to communications made to clergymen in reference to *criminal* conduct, has been strongly urged, on the ground that evil-doers should be enabled with safety to disburthen their guilty consciences, and by spiritual instruction and discipline to seek pardon and relief. The law of Papal Rome has adopted this principle in its fullest extent, not only,—as already intimated,<sup>8</sup>—by excepting such confessions from the general rules of evidence, but by punishing the priest who reveals them. It has even gone further; for Mascardus,—after observing that, in general, persons coming to the knowledge of facts under an oath of secrecy are compellable as witnesses to disclose them,—states that confessions to a priest are not within the operation of the rule, since they are made not so much to the priest as to the Deity whom he represents; and he thence draws the jesuitical conclusion that the priest, when appearing as a witness in his private character, may lawfully swear that he knows nothing of the subject: "*Hoc tamen restringe, non posse procedere in sacerdote producto in testem contra reum criminis, quando in confessione sacramentali fuit aliqui sibi dictum, quia potest dicere, se nihil scire ex eo; quod illud, quod scit, scit ut Deus, et ut Deus non producitur in testem,*"

<sup>1</sup> Lee v. Birrell, 3 Camp. 337; Webb v. Smith, 1 C. & P. 337.

<sup>2</sup> Loyd v. Freshfield, 2 C. & P. 325, per Abbott, C. J.

<sup>3</sup> Vaillant v. Dodemead, 2 Atk. 524; 4 T. R. 759, per Buller, J.; Ld. Falmouth v. Moss, 11 Price, 455.

<sup>4</sup> 4 T. R. 758, per Ld. Kenyon; Hoffman v. Smith, 1 Caines, 157, 159.

<sup>5</sup> Slade v. Tucker, L. R., 14 Ch. D. 824, per Jessel, M. R.; 49 L. J., Ch. 644, S. C. There the pursuivant had been employed in the conduct of a protest against a pedigree sought to be enrolled in the Heralds' College.

<sup>6</sup> See per Parke, B., in Turquand v. Knight, 2 M. & W. 100.

<sup>7</sup> Gr. Ev. § 247, in great part.

<sup>8</sup> Ante, § 879, n. <sup>5</sup>.

*sed ut homo, et tanquam homo ignorat illud super quo producitur.*"<sup>1</sup> In Scotland, where a prisoner in custody and preparing for his trial has confessed his crimes to a clergyman, in order to obtain spiritual advice and comfort, such confession is privileged; but this privilege is not carried so far as to include communications made confidentially to clergymen in the ordinary course of their duty.<sup>2</sup> Though the law of England encourages the penitent to confess his sins "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind;" yet the minister, to whom the confession is made, is merely excused from presenting the offender to the civil magistrate, and enjoined not to reveal the matter confessed, "under pain of irregularity."<sup>3</sup> In all other respects he is left to the full operation of the rules of the common law, which recognise no distinction between clergymen and laymen, but provide that all confessions and other matters, not confided to legal counsel, must be disclosed when required for the purposes of justice.<sup>4</sup> Neither penitential confessions made to the minister or to members of the party's own Church, nor even secrets confided to a Roman Catholic priest in the course of confession, are regarded as privileged communications.<sup>5</sup>

<sup>1</sup> 1 Mas. de Prob., Quæst. v. n. 51; id. Concl. 377. Vide Farin. Op., Tit. 8, Quæst. 78, n. 73.

<sup>2</sup> Tait, Ev. 386, 387; Alison, Pract. of Cr. L. 586; 2 Dickson, Ev. 937—939.

<sup>3</sup> Const. & Can. 1 J. 1, Can. cxlii.; 2 Gibson, Cod. p. 963.

<sup>4</sup> R. v. Gilham, 1 Moo. C. C. 186.

<sup>5</sup> Butler v. Moore, M'Nally, Ev. 253—255; Anon., Skin. 404, per Holt, C. J.; Du Barré v. Livette, Pea. R. 77; Com. v. Drake, 15 Mass. 161. By the N. York Civ. Code, § 1710, r. 3, "A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the Church to which he belongs." A somewhat similar statute exists in Missouri; Rev. St. of 1835, p. 623, § 16. In Broad v. Pitt, 3 C. & P. 519; M. & M. 234, S. C., Best, C. J., said, that he, for one, would never compel a clergyman to disclose communications made to him by a prisoner; but that if he chose to disclose them, he would receive them in evidence. In R. v. Griffin, 6 Cox, 219, Alderson, B., is reported to have gone further, and to have expressed an opinion that communications made by a prisoner to a clergyman ought not to be disclosed. See, also, R. v. Hay, 2 Fost. & Fin. 4; Joy on Conf. 49—58; Jer. Taylor's Sermon on the Anniversary of Gunpowder Treason, 6 vol. of his Works, pp. 614—622, ed. 1828; and a very learned pamphlet by the late Mr. Badeley on the Privilege of Religious Confessions in English Courts of Justice, publ. in 1865.

§ 918. Although the privilege, in its full extent, applies only to § 839 the communications which pass between a client and his legal adviser,<sup>1</sup> yet, with respect to the *production of title-deeds*, the protection has been held applicable to the case of *trustees* and *mortgagees*, who cannot be compelled either to produce the deeds of the *cestuis que trust*, or mortgagors, or to give parol evidence of their contents.<sup>2</sup> It may here be laid down as a general proposition, that, whenever a party is justified in refusing to produce an instrument, he cannot be forced to disclose its contents; and although some few dicta, or even decisions,<sup>3</sup> to the contrary may be found, the rule as above stated may now be considered as established. To adopt an observation of Mr. Baron Alderson,<sup>4</sup> "It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate."

§ 919. The protection afforded to professional confidence applies § 840 with equal force, though the client be in no shape before the court;<sup>5</sup> and although the rule which excludes hearsay prevents this question from often arising with respect to mere oral communications, it has often been discussed on occasions when a solicitor has been called upon, either by subpoena duces tecum or otherwise, to produce a document with which he has been confidentially intrusted by some *stranger* to the suit. In such a case, if the solicitor claims the privilege of the client, he will be protected not

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<sup>1</sup> Thomas v. Rawlings, 27 Beav. 140.

<sup>2</sup> Davies v. Waters, 9 M. & W. 608; R. v. Upper Boddington, 8 D. & R. 726; Chichester v. M. of Donegal, 39 L. J., Ch. 694, per Giffard, L. J. See Few v. Guppy, 10 Beav. 281, n. b; 13 Beav. 457, S. C. Also, ante, § 458.

<sup>3</sup> See Cocks v. Nash, 6 C. & P. 154, per Gurney, B.; Marston v. Downes, 1 A. & E. 31; 3 N. & M. 861, S. C., observed upon by Rolfe, B., in 9 M. & W. 613, 614.

<sup>4</sup> Davies v. Waters, 9 M. & W. 612.

<sup>5</sup> R. v. Withers, 2 Camp. 578, per Ld. Ellenborough.

only from producing the deed or other paper, but from answering any question with respect to its nature;<sup>1</sup> and although on several occasions the court has inspected the document, and pronounced upon its admissibility, according as its production has appeared to be prejudicial or not to the client,<sup>2</sup> it seems to be now settled, that, in strict law, the judge ought not to look at the writing to see whether it is a document which may properly be withheld.<sup>3</sup> The same rule applies where the documents called for are in the hands of solicitors for the trustees of bankrupts,<sup>4</sup> though it was at one time thought that their production was a matter of public duty.<sup>5</sup> In all these cases, if the client or principal would have been entitled, had he been called as a witness, to withhold the document, the solicitor, agent, or steward cannot be compelled, though he will be permitted, to produce it;<sup>6</sup> but if both the client and the solicitor, or the principal and the agent, concur in refusing to produce the document, the party calling for it may, in such an event, give secondary evidence of its contents.<sup>7</sup>

§ 920.<sup>8</sup> This protection, though confined to communications § 841 between a client and his legal adviser,<sup>9</sup> extends to all the necessary organs by which such communications are effected; and therefore an *interpreter*,<sup>10</sup> or an *intermediate agent*,<sup>11</sup> is under the

<sup>1</sup> *Volant v. Soyer*, 13 Com. B. 231.

<sup>2</sup> 1 Ph. Ev. 175; *Doe v. Langdon*, 12 Q. B. 711; *Copeland v. Watts*, 1 Stark. R. 95; *Harris v. Hill, D. & R.*, N. P. R. 17; 3 Stark. R. 140, S. C.; *Ditcher v. Kenrick*, 1 C. & P. 161; *Doe v. Thomas*, 9 B. & C. 288; 4 M. & R. 218, S. C.

<sup>3</sup> *Volant v. Soyer*, 13 Com. B. 231.

<sup>4</sup> *Laing v. Barclay*, 3 Stark. R. 42; *Bateson v. Hartsink*, 4 Esp. 43; *Cohen v. Templar*, 2 Stark. R. 260; *Hawkins v. Howard*, Ry. & M. 64; 1 C. & P. 222, S. C.; *Corsen v. Dubois*, Holt, N. P. R. 239; *Bull v. Loveland*, 10 Pick. 9, 14.

<sup>5</sup> *Pearson v. Fletcher*, 5 Esp. 80, per Ld. Ellenborough.

<sup>6</sup> *Hibberd v. Knight*, 2 Ex. R. 11. See ante, § 458.

<sup>7</sup> *Ditcher v. Kenrick*, 1 C. & P. 161; *R. v. Hunter*, 3 C. & P. 591. As to the cases where a witness may refuse to produce his deeds, or to disclose their contents, see ante, §§ 457—460.

<sup>8</sup> Gr. Ev. § 239, in part.

<sup>9</sup> *Thomas v. Rawlings*, 27 Beav. 140.

<sup>10</sup> *Du Barré v. Livette*, Pea. R. 77, explained in 4 T. R. 756; *Jackson v. French*, 3 Wend. 337; *Andrews v. Solomon*, 1 Pet. C. C. R. 356; *Parker v. Carter*, 4 Munf. 273.

<sup>11</sup> *Bustros v. White*, L. R., 1 Q. B. D. 423, 427, per Jessel, M. R.; *Bunbury* (3659)

same obligation as the legal adviser himself; and if the legal adviser has communicated with such person, he will be as much bound to silence, as if he had communicated directly with his client.<sup>1</sup> The rule also extends to a *solicitor's town or local agent*<sup>2</sup> (who is considered as standing in precisely the same situation as the solicitor), to a Scotch solicitor, and to a Scotch law agent practising in England;<sup>3</sup> and it has been held applicable to a case submitted, after the institution of the suit, to a *foreign* counsel, and to his opinion thereon.<sup>4</sup> Formerly it was thought that a barrister's or a solicitor's *clerk* was not within the reason and exigency of the rule; but as the principals, being unable to transact all their business in person, are under the necessity of employing clerks, it has since been held, that such clerks cannot be permitted to disclose facts coming to their knowledge in the course of employment, unless the barrister or solicitor himself might have been interrogated respecting them.<sup>5</sup> So, where a plaintiff, at the instance of his solicitors, sent out a gentleman to India, for the express purpose of acting as the solicitor's agent in the collection of evidence respecting a pending suit, letters written by the agent either to the plaintiff himself or to his solicitors on the subject of the evidence, have been regarded by the court as confidential communications.<sup>6</sup>

*v. Bunbury*, 2 Beav. 173; *Walker v. Wildman*, 6 Madd. 47; *Hooper v. Gumm*, 2 Johns. & Hem. 602; *Churton v. Frewen*, 2 Drew. & Sm. 390; *Jenkins v. Bushby*, 35 L. J., Ch. 820; *Reid v. Langlois*, 1 M. & Gord. 627, 638, 639, per Ld. Cottenham; 2 Hall & T. 59, 73, 74, S. C. See *Doe v. Jauncey*, 8 C. & P. 101.

<sup>1</sup> *Carpmael v. Powis*, 9 Beav. 16, 20, 21, per Ld. Langdale; S. C. 1 Phill. 692, 693, per Ld. Lyndhurst, recognising *Walker v. Wildman*, 6 Madd. 47.

<sup>2</sup> *Parkins v. Hawkshaw*, 2 Stark. R. 239, per Holroyd, J.; *Tait*, Ev. 385; *Goodall v. Little*, 20 L. J., Ch. 132; 1 Sim. N. S. 155, S. C.

<sup>3</sup> *Lawrence v. Campbell*, 4 Drew. 485.

<sup>4</sup> *Bunbury v. Bunbury*, 2 Beav. 173.

<sup>5</sup> *Taylor v. Forster*, 2 C. & P. 195, per Best, C. J., cited with approbation in 12 Pick. 93; *Foot v. Hayne*, 1 C. & P. 545; *Ry. & M.* 165, S. C., per Abbott, C. J.; *Chant v. Brown*, 9 Hare, 790; *Bowman v. Norton*, 5 C. & P. 177, per Tindal C. J.; *R. v. Upper Boddington*, 8 D. & R. 726, per Bayley, J.; *Mills v. Oddy*, 6 C. & P. 731; *Jackson v. French*, 3 Wend. 337.

<sup>6</sup> *Steele v. Stewart*, 1 Phill. 471; *Cossey Lond. Bright. & Co. Ry. Co.*, 5 Law Rep., C. P. 146; 39 L. J., C. P. 174, S. C.; *Lafone v. Falkland Islands Co.*, 27 L. J., Ch. 25, per Wood, V.-C.; 4 K. & J. 34, S. C.; *Hooper v.* (3660)

§ 921. The rule of protection, however, will not be carried to any further extent; and therefore, where the directors of a joint-stock company sent agents abroad to assist in winding up the affairs of the company, a correspondence between the directors and the agents relative to legal proceedings, which had been commenced against the directors by certain creditors of the company, was held not to be privileged, though many of the letters had been written for the purpose of aiding the directors in their defence, and of being submitted to their solicitors.<sup>1</sup> Indeed, it may be laid down generally, in the language of Lord Cranworth, that "there is no protection as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they were addressed to communicate them in professional confidence to his solicitor."<sup>2</sup> § 842

§ 922. As the privilege is established, not for the benefit of the solicitor, but for the protection of the client,<sup>3</sup> it would seem to extend to an executor in regard to papers coming to his hands as the personal representative of the solicitor.<sup>4</sup> If, however, a solicitor, in violation of his duty, should voluntarily communicate to a stranger the contents of an instrument with which he was confidentially intrusted, or should permit him to take a copy, the secondary evidence so obtained would, it seems, be admissible, § 843

Gumm, 2 Johns. & Hem. 602; *Walsham v. Stainton*, 2 Hem. & M. 1; *Ross v. Gibbs*, 8 Law Rep., Eq. 522; 39 L. J., Ch. 61, S. C.; *Bullock v. Corry*, L. R., 3 Q. B. D. 356; 47 L. J., Q. B. 352, S. C., nom. *Bullock v. Corrie*.

<sup>1</sup> *Glyn v. Caulfield*, 3 M. & Gord. 463, 473—475, per Ld. Truro; *Anderson v. British Bk. of Columbia*, 45 L. J., Ch. 449; L. R., 2 Ch. D. 644, S. C. See *Baker v. Lond. & S.-W. Ry. Co.*, 37 L. J., Q. B. 53; 3 Law Rep., Q. B. 91; 8 B. & S. 645, S. C. See post, § 1795.

<sup>2</sup> *Goodall v. Little*, 1 Sim. N. S. 155; recognised by Ld. Truro in *Glyn v. Caulfield*, 3 M. & Gord. 474; and in *Betts v. Menzies*, 26 L. J., Ch. 528, per Wood, V.-C. See also *Smith v. Daniell*, 44 L. J., Ch. 189, where an opinion, which had been given confidentially and as a friend by Ld. Westbury on a case submitted to him, was ordered to be produced. But see *Jenkins v. Bushby*, 35 L. J., Ch. 820; and *Hamilton v. Nott*, 42 L. J., Ch. 512, per Malins, V.-C.; 16 Law Rep., Eq. 112, S. C.

<sup>3</sup> *Herring v. Cloberry*, 1 Phill. 96, per Ld. Lyndhurst; B. N. P. 284, a.

<sup>4</sup> *Fenwick v. Reed*, 1 Meriv. 114, 120, arg.

provided that notice to produce the original were duly given, and the production were resisted on the ground of privilege.<sup>1</sup> Indeed,<sup>2</sup> it has more than once been laid down, that the mere fact that papers and other subjects of evidence have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, constitutes no valid objection to their admissibility, provided they be pertinent to the issue. For the court will not notice whether they were obtained lawfully or unlawfully, nor will it raise an issue to determine that question.<sup>3</sup>

§ 923. In order to protect communications, they must have been made to the legal adviser, while he was acting, or at least while he was considered by the client as acting,<sup>4</sup> in that capacity. The rule,<sup>5</sup> however, does not require any regular *retainer*, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be, in any way, consulted in his professional character.<sup>6</sup> It would also seem that if a person be consulted confidentially, under the erroneous supposition that he is a lawyer, he cannot be compelled to disclose the matters communicated.<sup>7</sup> But where a prisoner in custody on a charge of forgery wrote to a friend, requesting him "to ask Mr. G. or any other attorney" a question respecting the punishment of forgery, the letter was admitted in evidence, on the ground that it

<sup>1</sup> *Cleave v. Jones*, 21 L. J., Ex. 106, per Parke, B.; *Lloyd v. Mostyn*, 10 M. & W. 481, 482, per id., questioning the contrary decision of Bayley, J., in *Fisher v. Heming*, cited 1 Ph. Ev. 170. In *Lloyd v. Mostyn*, Parke, B., likened the case to that of an instrument being stolen, and a correct copy taken, and asked whether it would not be reasonable to admit such copy? If the client sustains any injury from such improper disclosure being made, an action will lie against the solicitor. *Taylor v. Blacklow*, 3 Bing. N. C. 235.

<sup>2</sup> Gr. Ev. § 254A, in great part.

<sup>3</sup> *Legatt v. Tollervey*, 14 East, 301; *Jordan v. Lewis*, id. 305, n.; *Doe v. Date*, 3 Q. B. 619; *Com. v. Dana*, 2 Metc. 329, 337.

<sup>4</sup> *Smith v. Fell*, 2 Curt. 667. There a communication was held to be privileged, which was made by a party to a solicitor, under the impression that the latter acceded to a request to act as his legal adviser.

<sup>5</sup> Gr. Ev. § 241, in part.

<sup>6</sup> *Foster v. Hall*, 12 Pick. 89. See, also, *Bean v. Quimby*, 5 New Hamps. 94.

<sup>7</sup> *Calley v. Richards*, 19 Beav. 401, 404, per Romilly, M. R., questioning *Fountain v. Young*, 6 Esp. 113, per Sir J. Mansfield.

did not appear that the relation of attorney and client ever subsisted between Mr. G. and the prisoner.<sup>1</sup> So, if a party were to go to a solicitor to discount a forged note, or to raise money on a forged will, what passed at the interview would of course not be privileged, unless, perhaps, in the event of the solicitor being consulted as the party's own lawyer.<sup>2</sup>

§ 924. The question of privileged communications has hitherto § 845 been considered with respect to cases in which the *legal adviser* is called as a witness; but although the privilege is, as before observed, that of the client, and not that of the professional adviser, the rule of protection was for many years laid down in less broad terms, where the *client* himself was the *party interrogated*.<sup>3</sup> It was indeed long since established, that, *in that event*, all communications between the solicitor and client, whether pending and with reference to litigation, or made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation, though not in contemplation of, or with reference to, that litigation, were protected; as also were communications made respecting the subject-matter in question, pending, or in contemplation of, litigation on the same subject with other persons, with the view of asserting the same right.<sup>4</sup> If, however, communications passed between a client and solicitor *before any dispute* had arisen between the client and his opponent, the opponent could compel the client by a bill in equity to disclose these communications, although they related to the matters which

<sup>1</sup> R. v. Brewer, 6 C. & P. 363, per Park, J.

<sup>2</sup> R. v. Farley, 2 C. & Kir. 313, 317, 318. See ante, § 912; post, § 929.

<sup>3</sup> See Maccann v. Maccann, 3 Swab. & Trist. 142, per Cresswell, J. O.

<sup>4</sup> Holmes v. Baddeley, 1 Phill. 476; per Wigram, V.-C., in *Ld. Walsingham v. Goodricke*, 3 Hare, 124, 125, citing *Bolton v. Corp. of Liverpool*, 3 Sim. 467; 1 Myl. & K. 88, S. C.; *Hughes v. Biddulph*, 4 Russ. 190; *Goodall v. Little*, 1 Sim. N. S. 155; *Thompson v. Falk*, 1 Drew. 21; *Vent v. Pacey*, 4 Russ. 193; *Clagett v. Phillips*, 2 Y. & C., Ch. R. 82; *Combe v. Corp. of London*, 1 id. 631. See, also, *Woods v. Woods*, 4 Hare, 63; *Reece v. Trye*, 9 Beav. 316; *Adams v. Barry*, 2 Y. & C., Ch. R. 167; *Knight v. M. of Waterford*, 2 Y. & C., Ex. R. 38; *Curling v. Perring*, 2 Myl. & K. 38; *Kennedy v. Lyell*, L. R., 23 Ch. D. 387, per Ct. of App.; S. C. nom. *Lyell v. Kennedy*, L. R., 9 App. Cas. 81, per Dom. Proc.; 53 L. J., Ch. 449, S. C.; and *Nias v. North. & East. Ry. Co.*, 3 Myl. & Cr. 355. These cases overrule *Preston v. Carr*, 1 Y. & J. 175, and *Newton v. Beraford*, 1 You. 376. See 3 Hare, 129.



formed the subject of the suit, except so far as they contained mere legal advice or opinions.<sup>1</sup>

§ 925. This doctrine was propounded in the case of *Radcliffe v. Fursman*<sup>2</sup> by the House of Lords, at a time when the subject of professional confidence was not developed to the same extent as it is at the present day;<sup>3</sup> but although that decision was afterwards disapproved of by almost every judge under whose notice it was brought, and its principle was more than once successfully exposed and refuted,<sup>4</sup> it was still reluctantly followed till the year 1873, when Lord Chancellor Selborne had the hardihood to set it at nought in the important case of *Minet v. Morgan*.<sup>5</sup>

§ 926. If a solicitor be employed for two parties, as for mortgagor and mortgagee, and peruse on behalf of the former his abstracts of the title, he cannot, as against him, disclose their contents;<sup>6</sup> and where a professional man was engaged by vendor and purchaser to

<sup>1</sup> *Ld. Walsingham v. Goodricke*, 3 Hare, 122, per Wigram, V.-C., reluctantly submitting to *Radcliffe v. Fursman*, 2 Br. P. C. 514, Toml. ed. See, also, *Penruddock v. Hammond*, 11 Beav. 59; *Hawkins v. Gathercole*, 1 Sim. N. S. 150; *Beadon v. King*, 17 Sim. 34; and *Greenlaw v. King*, 1 Beav. 137, in which last case *Ld. Langdale* compelled a son and heir to discover a case, which had been submitted to counsel by his father, and had come with the estate to his hands. See, contra, *Wilson v. Northampton & Banbury Junction Ry. Co.*, 14 Law Rep., Eq. 477, per Malins, V.-C. See, further, *Manser v. Dix*, 1 Kay & J. 451, per Wood, V.-C.; *Macfarlan v. Rolt*, 14 Law Rep., Eq. 580, per Wickens, V.-C. and *Calley v. Richards*, 19 Beav. 401, 405, per Romilly, M. R.

<sup>2</sup> 2 Br. P. C. 514, Toml. ed.

<sup>3</sup> Per Wigram, V.-C., 3 Hare, 127.

<sup>4</sup> See *Bolton v. Corp. of Liverpool*, 1 Myl. & K. 88, per *Ld. Brongham*; *Pearse v. Pearse*, 1 De Gex & Sm. 24, 25, per K. Bruce, V.-C.; *Walker v. Wildman*, 6 Madd. 47; *Preston v. Carr*, 1 Y. & J. 175; *Ld. Walsingham v. Goodricke*, 3 Hare, 127—130; *Bp. of Meath v. M. of Winchester*, 10 Bli. 375, 455; *Pearse v. Pearse*, 1 De Gex & Sm. 12. See, also, two articles in *Law Mag.*, vol. xviii., pp. 51—74, and vol. xxx., pp. 107—123.

<sup>5</sup> 8 Law Rep., Ch. Ap. 361; 42 L. J., Ch. 627, S. C.; followed by Hall, V.-C., in *Turton v. Barber*, 17 Law Rep., Eq. 329; 43 L. J., Ch. 468, S. C.; and in *Bacon v. Bacon*, 34 L. T. 349; and by C. P. D. in *Mostyn v. West Mostyn Coal & Iron Co.*, 34 L. T. 531. See, also, *Bullock v. Corry*, L. R., 3 Q. B. D. 356; 47 L. J., Q. B. 352, S. C. nom. *Bullock v. Corrie*.

<sup>6</sup> *Doe v. Watkins*, 3 Bing. N. C. 421; 4 Scott, 155, S. C. But see *R. v. Avery*, 8 C. & P. 596, cited post, § 929.

prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties, it was held that he could not produce it at the trial against the interest of the purchaser's devisees, though with the consent of the vendor.<sup>1</sup> If, however, a solicitor, acting as such for opposite parties, has an offer made to him by the one for the purpose of being communicated to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party.<sup>2</sup> And, where two persons, having a dispute about a claim made by one of them upon the other, went together to a solicitor, when one of them made a statement, and instructed the solicitor to write a letter to a third party on the subject of the claim,—it was held that, in a subsequent action between these two persons, both the statement and the letter were admissible in evidence.<sup>3</sup> So, if a wife were induced by her husband to deal with her separate interest under the advice of her husband's solicitor, he would be regarded by the client as acting for both husband and wife; and, consequently, in the event of any dispute arising between the married couple, each party would be entitled to call for the production, and to have full inspection, of all documents that might have come into possession of the solicitor in the course of the transaction.<sup>4</sup> In all these cases the question would seem to be, was the communication made by the party to the witness in the character of his own *exclusive* solicitor? If it was, the bond of secrecy is imposed upon the witness; if it was not, the communication will not be privileged.<sup>5</sup>

§ 927.<sup>6</sup> The protection does not cease with the termination of the suit, or other litigation or business, in which the communications

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<sup>1</sup> Doe v. Seaton, 2 A. & E. 171; 4 N. & M. 81, S. C.

<sup>2</sup> Baugh v. Cradocke, 1 M. & Rob. 182; Cleve v. Powel, id. 228; Perry v. Smith, 9 M. & W. 681; Reynell v. Sprye, 10 Beav. 51.

<sup>3</sup> Shore v. Bedford, 5 M. & Gr. 271. See, also, Griffith v. Davies, 5 B. & Ad. 502, and Weeks v. Argent, 16 M. & W. 817.

<sup>4</sup> Warde v. Warde, 3 M. & Gord. 365; overruling a decision by Ld. Cranworth in the same case, reported 1 Sim. N. S. 18.

<sup>5</sup> Perry v. Smith, 9 M. & W. 682, 683, per Parke, B.; Reynell v. Sprye, 10, Beav. 51.

<sup>6</sup> Gr. Ev. § 243, in part.

were made; nor is it affected by the party's ceasing to employ the solicitor, and retaining another, nor by any other change of relation between them, nor by the solicitor's being struck off the rolls,<sup>1</sup> nor by his becoming personally interested in the property, to the title of which the communications related,<sup>2</sup> nor even by the death of the client. The seal of the law, once fixed upon the communications, *remains for ever*,<sup>3</sup> unless it be removed either by the party himself,<sup>4</sup> in whose favour it was placed, or perhaps, in the event of his death, by his personal representative;<sup>5</sup> and, therefore, if the client becomes a bankrupt, his trustee cannot waive the privilege without his particular permission.<sup>6</sup> Neither does the client waive his privilege by calling the solicitor as a witness, unless he also examines him in chief to the matter privileged;<sup>7</sup> and even in that case, it has been held in Ireland, that the cross-examination must be confined to the point upon which the witness has been examined in chief.<sup>8</sup>

§ 928. In stating that the privilege does not terminate with the death of the client, care must be taken to distinguish between cases where disputes arise between the client's representatives and strangers, and those in which both the litigating parties claim under the client. In the former class of cases no doubt the protection will survive for the benefit of those who represent the client; but in the latter, it would be obviously unjust to determine that the privilege should belong to the one claimant rather than to the other.

<sup>1</sup> *Ld. Cholmondeley v. Ld. Clinton*, 19 Ves. 268.

<sup>2</sup> *Chant v. Brown*, 7 Hare, 79.

<sup>3</sup> *Wilson v. Rastall*, 4 T. R. 759, per Buller, J.; *Parker v. Yates*, 12 Moore, 520. But see *Charlton v. Coombes*, 32 L. J., Ch. 284, per Stuart, V.-C.; 4 Giff. 372, S. C.

<sup>4</sup> *Merle v. More*, Ry. & M. 390, per Best, C. J.; *Baillie's case*, 21 How. St. Tr. 341, 358, 408. "If the client be willing, the court will compel the counsel to discover what he knows," per North, C. J., in *Lea v. Wheatley*, in C. B. Pasch. 30 Car. 2, cited in n. to 20 How. St. Tr. 574. See, also, *Blenkinsop v. Blenkinsop*, 17 L. J., Ch. 343, and *Chant v. Brown*, 7 Hare, 79.

<sup>5</sup> *Doe v. M. of Hertford*, 19 L. J., Q. B. 526.

<sup>6</sup> *Bowman v. Norton*, 5 C. & P. 177, per Tindal, C. J.

<sup>7</sup> *Vaillant v. Dodemead*, 2 Atk. 524; *Waldron v. Ward*, Sty. 449; *Bate v. Kinsey*, 1 C. M. & R. 38.

<sup>8</sup> *M'Donnell v. Conry*, Ir. Cir. R. 807, per Richards, B.

The rule, therefore, has no application in cases of testamentary dispositions, and as between parties claiming under the testator; and where the question was, whether certain executors were or were not trustees for the testator's next of kin, the evidence of the solicitor who prepared the will as to what had passed between him and the testator on the subject of the will, has been received on behalf of the next of kin.<sup>1</sup>

§ 929. Whether the protection can be removed without the client's consent, in cases where the interests of *criminal justice* require the production of the evidence, may admit of some doubt.<sup>2</sup> In one case where a party had intrusted a solicitor with a promissory note, and had instructed him to bring an action upon it, Mr. Justice Holroyd held that the solicitor ought not to produce the note, on the trial of a subsequent indictment against his client for forgery;<sup>3</sup> and a similar decision appears to have been pronounced by the Court of King's Bench in the time of Lord Mansfield.<sup>4</sup> On the other hand, Mr. Justice Patteson has compelled a solicitor, who had been employed by a mortgagor and mortgagee to negotiate a loan between them, and had received from the former a forged will as part of his title-deeds, to produce the will on a trial of the mortgagor for forging that instrument.<sup>5</sup> So, where a party having possessed himself of the title deeds of a deceased person, placed a forged will of the deceased amongst them, and then sent the whole to his solicitor, ostensibly for the purpose of asking his advice upon them, but really, as it seemed, that the solicitor might find the will

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<sup>1</sup> *Russell v. Jackson*, 9 Hare, 393, per Turner, V.-C.

<sup>2</sup> *R. v. Tylney*, 18 L. J., M. C. 37; S. C., nom. *R. v. Tuffs*, 1 Den. 319. But this doubt is certainly not applicable to matrimonial proceedings, which are *civil* proceedings, though the question at issue may involve the sin of adultery, *Branford v. Branford*, L. R., 4 P. D. 72; 48 L. J., P. D. & A. 40, S. C.

<sup>3</sup> *R. v. Smith*, cited in 1 Ph. Ev. 171. See, also, *R. v. Hankins*, 2 C. & Kir. 823.

<sup>4</sup> *R. v. Dixon*, 3 Burr. 1687. See, also, *Anon.*, 8 Mass. 370.

<sup>5</sup> *R. v. Avery*, 8 C. & P. 596, 599. In this case the learned judge is reported to have said that *R. v. Smith* was not law, but in *R. v. Tylney*, 18 L. J., M. C. 37; S. C., nom. *R. v. Tuffs*, 1 Den. 324, he intimated that this language was too strong. See, also, ante, §§ 912, 923.

and act upon it,—the judges unanimously held, that the solicitor was bound to produce the will on the trial of his client for forgery, it not having been intrusted to him in professional confidence, *even if that would have made any difference*.<sup>1</sup> Again, where a prisoner was indicted for forging a will, and it appeared that his wife had taken the will to a solicitor, and asked him to advance money upon it for her husband, which he refused to do, but took a copy of the will, the judges most properly held that such copy was admissible as secondary evidence, and that the conversation between the wife and the solicitor was not privileged.<sup>2</sup> This last case, however, is scarcely an authority on either side of the question; for the judges took the distinction that the solicitor consulted was not the prisoner's own legal adviser.

§ 930.<sup>3</sup> This rule may be further illustrated by reference to the cases in which the solicitor may be examined, and which are therefore sometimes mentioned as *exceptions* to the rule. These apparent exceptions are,—where the knowledge was not acquired by the solicitor *solely* by his being employed professionally, but was in some measure obtained by his acting as a *party* to the transaction, and the more especially so, if this transaction was fraudulent;<sup>4</sup> or where the

<sup>1</sup> *R. v. Hayward*, 2 C. & Kir. 234. See *R. v. Jones*, 1 Den. 166; *R. v. Brown*, 9 Cox, 281; and *R. v. Downer*, 14 Cox, 486.

<sup>2</sup> *R. v. Farley*, 2 C. & Kir. 313; 1 Den. 197, S. C.

<sup>3</sup> Gr. Ev. § 244, in great part.

<sup>4</sup> Besides the exceptions here stated, the following case may be mentioned. In a suit for taking a partnership account between solicitors, semble that the plaintiff is entitled to the discovery and production of papers material to the account, though they relate to professional business transacted for clients, and the consequent effect of their production must be that some stranger will become acquainted with matters intrusted to the partners in confidence. *Brown v. Perkins*, 2 Hare, 540. This case obviously rests on necessity, for otherwise no account could ever be taken between solicitors acting in partnership.

<sup>5</sup> See *Follett v. Jefferyes*, 1 Sim. N. S. 3, 17, where Rolfe, V.-C., observed, "It is not accurate to speak of cases of fraud, contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no court can permit it to be said that the contriving of a fraud can form part of the professional occupa-

communication was made *before* the solicitor was employed as such, or *after* his employment had *ceased*;—or where, though consulted by a friend because he was a solicitor, he had refused to act as such, and was therefore only applied to *as a friend*;—or where the information was obtained, not exclusively from the client, but also from some other independent source;<sup>1</sup>—or where it could not be fairly stated that any communication had been made; as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the solicitor, but of which fact *any other man*, if there, would have been *equally conusant*<sup>2</sup> (and even this has been held privileged in some of the cases);—or where the matter communicated was *not in its nature private*, and could in no sense be termed the subject of a confidential disclosure;<sup>3</sup>—or where it had *no reference to professional employment*, though disclosed while the relation of solicitor and client subsisted;<sup>4</sup>—or where the solicitor, having made himself a *subscribing witness* and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the solicitor is not called upon to disclose matters, which he can be said to have learned by communication with his client, or on his client's behalf; matters, which were so committed to him in his capacity of solicitor; and matters, which in that capacity alone he had come to know.<sup>5</sup>

§ 931. It may here be expedient to illustrate these apparent ex- § 853

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tion of a solicitor." See, also, *Charlton v. Coombes*, 32 L. J., Ch. 284; 4 Giff. 372, S. C.; and *Kelly v. Jackson*, 13 Ir. Eq. R. 129.

<sup>1</sup> *Lewis v. Pennington*, 29 L. J., Ch. 670, per Romilly, M. R.; *March v. Keith*, 30 L. J., Ch. 127, per Kindersley, V.-C.; S. C. nom. *Marsh v. Keith*, 1 Drew. & Sm. 342.

<sup>2</sup> *Brown v. Foster*, 1 H. & N. 736, cited post, § 934.

<sup>3</sup> See *Doe v. M. of Hertford*, 19 L. J., Q. B. 526.

<sup>4</sup> *Goodall v. Little*, 20 L. J., Ch. 132; 1 Sim. N. S. 155, S. C.

<sup>5</sup> Per I.d. Brougham, in *Greenough v. Gaskell*, 1 Myl. & K. 104. See, also, *Desborough v. Rawlins*, 3 Myl. & Cr. 521, 522; *Story*, Eq. Pl. §§ 601, 602; *Bolton v. Corp. of Liverpool*, 1 Myl. & K. 88; *Annesley v. I.d. Anglesea*, 17 How. St. Tr. 1239—1244.

ceptions somewhat more at length. Thus, if a solicitor, having been engaged in a conspiracy, be willing to turn informer, he cannot be prevented from disclosing what he knows of the transaction, though he may have been employed by some of the guilty parties in his professional character, and have acquired much of his knowledge in consequence of that connexion.<sup>1</sup> In one case,<sup>2</sup> usury in a mortgage was proved by the plaintiff's solicitor, who prepared the deed, and who was called by the defendant to prove the consideration usurious. Lord Kenyon, who admitted this evidence, assumed that the solicitor had, by his conduct, become a party to the transaction; but as the facts do not warrant this assumption, the case cannot be supported at the present day,<sup>3</sup> and it is only valuable as recognising the general principle, that if a solicitor acts as a party, no knowledge he obtains will be privileged. Again, a solicitor has been compelled to disclose a confession made to him by his client before the retainer, respecting an erasure in a will;<sup>4</sup> as also a gratuitous conversation which his client had held with him after the compromise of a suit, in which he stated that he was glad the action was settled, as the promissory note on which it was founded had been indorsed to him without consideration, and with notice that it was void as being mixed up without a lottery transaction.<sup>5</sup> On the other hand, where a person, having possession of a deed in the character of trustee to the defendant, had first obtained a knowledge of its contents while acting as his solicitor, the knowledge thus obtained was held to be privileged;<sup>6</sup> and, in another case, where a solicitor became a trustee under a deed for the benefit of his client's creditors, it was held that subsequent communications made to him by the client could not be divulged.<sup>7</sup>

§ 932. Where a trustee for two parties had acted as solicitor for § 884

<sup>1</sup> 1 Myl. & K. 103, 104, 109, per Ld. Brougham.

<sup>2</sup> Duffin v. Smith, Pea. R. 108.

<sup>3</sup> See Ld. Brougham's observations in 1 Myl. & K. 109. But see ante, § 929.

<sup>4</sup> Cutts v. Pickering, 1 Ventr. 197.

<sup>5</sup> Cobden v. Kendrick, 4 T. R. 431.

<sup>6</sup> Davies v. Waters, 9 M. & W. 608. In that case, the witness, as trustee, might equally have refused to state the contents of the deed, but it was objected in Banc that this point was not raised at Nisi Prius. See ante, § 918.

<sup>7</sup> Pritchard v. Foulkes, 1 Coop. 14.

one, in respect of certain disputes which had arisen between the two on the subject of the trusts, the court held that, inasmuch as he had been voluntarily placed in a situation inconsistent with his duty as trustee for both parties, the communications between him and his client were not privileged as against the other cestui que trust.<sup>1</sup> So, where a solicitor had been confidentially consulted, but had not been professionally employed, because he was at that time acting as undersheriff, he was held bound to disclose what had been communicated to him.<sup>2</sup> Again, in *Griffith v. Davies*,<sup>3</sup> a witness called by the plaintiff was permitted to state a conversation, in which the defendant proposed a compromise to the plaintiff, although, when the conversation took place, the witness was attending as solicitor for the defendant; for, in this case, the knowledge gained by the witness was not by reason of its being intrusted to him in his professional character, but merely by his being present at the conversation.<sup>4</sup> So, if a solicitor, by the direction of his client, makes a proposal to the opposite party, he may be compelled to disclose what he stated to that party, though he cannot divulge what his client had communicated to him;<sup>5</sup> and if communications from an adverse party be made, either directly to the solicitor for the purpose of being communicated to the client,<sup>6</sup> or to the client himself in the presence of the solicitor,<sup>7</sup> the solicitor is not at liberty to withhold them. Indeed, he is bound, as it seems, to produce all letters, and to disclose all information, communicated to him from *collateral quarters*.<sup>8</sup>

<sup>1</sup> *Tugwell v. Hooper*, 10 Beav. 348.

<sup>2</sup> *Wilson v. Rastall*, 4 T. R. 753. See *Calley v. Richards*, 19 Beav. 401, 404.

<sup>3</sup> 5 B. & Ad. 502. See, also, *Shore v. Bedford*, 5 M. & Gr. 271; *Weeks v. Argent*, 16 M. & W. 817.

<sup>4</sup> Per Alderson, B., in *Davies v. Waters*, 9 M. & W. 611.

<sup>5</sup> Per Parke and Patteson, Js., 5 B. & Ad. 503, commenting on and questioning *Gainsford v. Grammar*, 2 Camp. 9. See, also, *Ripon v. Davies*, 2 N. & M. 310; and *Reynell v. Sprye*, 10 Beav. 51.

<sup>6</sup> *Spenceley v. Schulenburg*, 7 East, 357. There the solicitor was held bound to discover the contents of a notice to produce documents, which he had received from the opposite solicitor. See, also, *Ford v. Tennant*, 32 L. J., Ch. 465, per Romilly, M. R.; 32 Beav. 162, S. C.; *Gore v. Harris*, 21 L. J., Ch. 10, per Parker, V.-C.; S. C. nom. *Gore v. Bowser*, 5 De Gex & Sm. 30; *Paddon v. Winch*, 39 L. J., Ch. 627, per James, V.-C.

<sup>7</sup> *Desborough v. Rawlins*, 3 Myl. & Cr. 515, per Ld. Cottenham.

<sup>8</sup> Thus, a communication between a solicitor and one of his client's witnesses  
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§ 933. The legal adviser must also disclose all questions put to him by his client, together with his answers thereto, provided such questions were asked in order to gain information respecting *matters of fact*, as distinguished from those put with the view of obtaining *legal advice*.<sup>1</sup> This proposition has, on one occasion,<sup>2</sup> been applied to circumstances which seem scarcely to have warranted its application. The question was, whether the client had committed an act of bankruptcy on a particular day. On that day the client inquired of his solicitor, whether he could safely attend a particular meeting of his creditors without being arrested for debt. The solicitor advised him to remain in his office, until it was ascertained whether the creditors would engage to give him safe-conduct, and he accordingly remained there for two hours to avoid being arrested, till the solicitor returned from the meeting. The court held that what had passed between the solicitor and his client was receivable in evidence, Lord Tenterden observing, that "a man could hardly ask, *as matter of law*, whether he would be free from arrest while attending a voluntary meeting of creditors, though he might well ask, *as matter of fact*, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent an arrest;" and his lordship added, "The solicitor gives no *legal advice*, his answer implying that no arrangement had been made, but that he would see at the meeting whether any could be effected; and he recommends his client, not as a *legal adviser* but as any agent or any friend might have recommended, to stay where he was till that matter of fact could be ascertained."<sup>3</sup>

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as to the evidence to be given by the witness, is not privileged; *Mackenzie v. Yeo*, 2 Curt. 866. But, semble, a solicitor is not bound to produce the "proof" of a witness's evidence, which he had prepared for insertion in his counsel's brief, per Bovill, C. J., in the *Tichborne* case, 28 Feb., 1872, MS.

<sup>1</sup> *Sawyer v. Birchmore*, 3 Myl. & K. 572, per Ld. Cottenham; *Spenceley v. Schulenburg*, 7 East, 357; *Desborough v. Rawlins*, 3 Myl. & Cr. 515.

<sup>2</sup> *Bramwell v. Lucas*, 2 B. & C. 743, observed upon by Ld. Brougham, in 1 Myl. & K. 113—115; and also by Ld. Cottenham, in 3 Myl. & Cr. 520—522.

<sup>3</sup> 2 B. & C. 749, 750.

§ 934. Again, it is no breach of professional confidence for a legal adviser to give evidence of a fact not communicated directly to him by his client, but the knowledge of which has been acquired by him during the progress of a trial. The case of *Brown v. Foster*<sup>1</sup> well illustrates this proposition. There, counsel had attended before a magistrate on behalf of a man charged with embezzlement, and the prosecutor had produced a book, in which the accused, contrary to his duty, had omitted to enter a sum of money received by him. On a subsequent examination the book was found to contain the entry. The accused afterwards brought an action for malicious prosecution, and it was held at the trial, that the counsel might give evidence that the entry was not in the book at the time of the first examination, as that fact had not been communicated to him by his client, but he had become cognisant of it through his own personal observation. A solicitor may also be called, either to prove his client's handwriting, though he be acquainted with it only from having seen him sign documents in the cause;<sup>2</sup> or to disclose the name of the person by whom he was retained, in order to let in the declarations and admissions of the real party in interest;<sup>3</sup> or to discover when and to whom he parted with his client's title-deeds, and in whose possession they are.<sup>4</sup> So, for the purpose of letting in secondary evidence of the contents of a document, a solicitor will be bound to answer whether it is in his possession or elsewhere in court, even though he may have obtained it from his client in the course of communication with reference to the cause.<sup>5</sup>

§ 935. The legal adviser, too, is bound to furnish any information in his power which may lead to the discovery of his client's

<sup>1</sup> 1 H. & N. 736.

<sup>2</sup> *Hurd v. Moring*, 1 C. & P. 372, per Abbott, C. J.; *Johnson v. Daverne*, 19 Johns. 134; 4 Hawk. P. C., 2, c. 46, § 89.

<sup>3</sup> *Levy v. Pope*, M. & M. 410, per Parke, J.; *Brown v. Payson*, 6 New Hamps. 443.

<sup>4</sup> *Banner v. Jackson*, 1 De Gex & Sm. 472, per K. Bruce, V.-C., reluctantly yielding to *Stanhope v. Knott*, 2 Swanst. 221, n., and *Kingston v. Gale*, Rep. temp. Finch, 259.

<sup>5</sup> *Dwyer v. Collins*, 7 Ex. R. 639; *Coates v. Birch*, 2 Q. B. 252; 1 G. & D. 474, S. C.; *Bevan v. Waters*, M. & M. 235, per Best, C. J.; *Eicke v. Nokes*, id. 303; *Roupell v. Haws*, 3 Fost. & Fin. 797, per Channell, B.

address, especially if that client be a ward in Chancery, who is attempting to conceal his residence from the court.<sup>1</sup> So, also, he may be called to identify his client as the person who has put in any pleading, or sworn any affidavit, because these acts, so far from being secrets, are in their very nature matters of publicity.<sup>2</sup> From one case it would even seem that a solicitor might be compelled to divulge the character in which his client employed him, as, for instance, whether as executor, or trustee, or on his own private account;<sup>3</sup> but, in America, it has been held, that counsel could not state whether they were employed to conduct an ejectment for their client, as *landlord of the premises*.<sup>4</sup> A solicitor, who has prepared a will at the instance of a party benefited by it, is not privileged to withhold from the Probate Division of the High Court any facts, which are connected with contemporaneous business transacted between the testator and himself on account of his client the legatee, when his opinion of the testator's capacity to make a will is in any degree founded on such facts.<sup>5</sup>

§ 936. Moreover, the privilege does not attach to *unnecessary* § 857 *communications* made by a client to his legal adviser; and therefore a prosecutor's solicitor has been allowed to state that, pending the proceedings on the indictment, his client had observed to him that he would give a large sum to have the prisoner hanged;<sup>6</sup> and, in an action brought by a solicitor for his bill, where the question was whether he had been employed by the defendant or by a third party, a statement made by the plaintiff to his solicitor, on introducing such third party to him, was held to be excluded from the

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<sup>1</sup> *Ramsbotham v. Senior*, 8 Law Rep., Eq. 575, per Malins, V.-C.; *Burton v. Ld. Darnley*, id. 576, n.; *Ex parte Campbell*, 5 Law Rep., Ch. Ap. 703. But see *Heath v. Crealock*, 15 Law Rep., Eq. 257, per Bacon, V.-C.

<sup>2</sup> B. N. P. 234, b.; *Studdy v. Sanders*, 2 D. & R. 347; *Doe v. Andrews*, 2 Cowp. 846, per Ld. Mansfield; cited by Ld. Brougham in 1 Myl. & K. 108, overruling *R. v. Watkinson*, 2 Str. 1122.

<sup>3</sup> *Beckwith v. Benner*, 6 C. & P. 681, per Gurney, B.

<sup>4</sup> *Chirac v. Reinicker*, 11 Wheat. 280, 295.

<sup>5</sup> *Jones v. Goodrich*, 5 Moo. P. C. R. 16, 25.

<sup>6</sup> *Annesley v. Ld. Anglesea*, 17 How. St. Tr. 1223—1244; *Cobden v. Kendrick*, 4 T. R. 431, cited ante, § 931.

rule of privilege.<sup>1</sup> So, if a solicitor *attests an instrument* which his client executes, he may be compelled, either to prove the execution, or to disclose all that passed at that time, even though such evidence may establish the invalidity of the deed; for by becoming a subscribing witness he makes himself a public man, and pledges himself to give evidence on the subject, whether he be called by the party by or to whom the deed is executed, or by any other person who claims an interest in the property.<sup>2</sup>

§ 937. But where the assignees of a bankrupt, in an action of § 858  
assumpsit brought by them, endeavoured to establish that the bankrupt had made a fraudulent conveyance to his son, and, in order to prove this transaction, called the bankrupt's solicitor, Lord Ellenborough held that, though, as attesting witness to the deed, he was bound to disclose what took place at the time of its execution, he was privileged from stating what occurred during its concoction and preparation, and could not be asked whether it had not been subsequently destroyed, if the only knowledge he had, as to its concoction, preparation or destruction, was acquired from his confidential situation as solicitor.<sup>3</sup> So, a legal adviser cannot, as it would seem, disclose in what condition an instrument was when it was intrusted to him by his client, as whether or not it then were stamped, or indorsed, or had an erasure upon it;<sup>4</sup> and in an action of trover for a lease, brought by the assignees of a bankrupt, where the question was whether the lease had been deposited

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<sup>1</sup> Gillard v. Bates, 6 M. & W. 547; 8 Dowl. 774, S. C. See, also, Caldbeck v. Boon, 1 R., 7 C. L. 32.

<sup>2</sup> Doe v. Andrews, 2 Cowp. 845; Robson v. Kemp, 5 Esp. 53; 4 id. 235; Crawcour v. Salter, L. R., 18 Ch. D. 30, 38, per Malins, V.-C.; Sanford v. Remington, 2 Ves. 189.

<sup>3</sup> Robson v. Kemp, 5 Esp. 52.

<sup>4</sup> Wheatley v. Williams, 1 M. & W. 533. In B. N. P. 284 a, it is stated, that, "if the question were about a rasure in a deed or will, the attorney might be examined to the question, whether he had ever seen it in any other plight;" but, in Wheatley v. Williams, Ld. Abinger observed, that this passage "must apply to a case where the attorney has his knowledge independently of any communication from the client; it cannot mean that where the attorney, coming to the client for a confidential purpose, obtains some other collateral information which he would not otherwise have possessed, he can be compelled to disclose it," p. 541. See, also, Brown v. Payson, 6 New Hamps. 443.

with the defendant by the bankrupt before or after the bankruptcy, a solicitor, who, after the act of bankruptcy, had been applied to by the bankrupt to procure a loan, was not permitted to state whether his client had, on that occasion, brought to him the lease, for the purpose of raising money upon it.<sup>1</sup>

§ 938.<sup>2</sup> *Judges, arbitrators, and counsel form a third class of* § 850  
persons, who, from motives of public policy, are perhaps not compellable to testify as to certain matters, in which they have been judicially or professionally engaged; though, like ordinary persons, they may be called upon to speak to any foreign and collateral matters, which happened in their presence, while the trial was pending, or after it was ended.<sup>3</sup> In regard to judges of courts of record, it is considered dangerous, or at least highly inconvenient, to compel them to state what occurred before them in court; and on this ground the grand jury have been advised not to examine a chairman of quarter sessions, as to what a person testified in a trial in his court.<sup>4</sup> The case of arbitrators is governed by the same general policy; and the courts will not disturb the deliberate decision of an arbitrator, by requiring him to disclose the grounds of his award, unless under very cogent circumstances, such as upon an allegation of fraud; for *Interest reipublice ut sit finis litium*.<sup>5</sup> Of course, a judge or an arbitrator may, by his own consent, be examined respecting the facts proved, or the matters claimed, at the trial or the reference;<sup>6</sup> and an arbitrator may be asked questions for the purpose of showing that he has exceeded his powers, as, for instance, by awarding compensation for injuries not included in the matters submitted to him.<sup>7</sup> With

<sup>1</sup> Turquand v. Knight, 2 M. & W. 98.

<sup>2</sup> Gr. Ev. § 249, in part.

<sup>3</sup> R. v. E. of Thanet, 27 How. St. Tr. 845—848; Ponsford v. Swaine, 1 Johns. & Hem. 433.

<sup>4</sup> R. v. Gazard, 8 C. & P. 595, per Patteson, J.

<sup>5</sup> Johnson v. Durant, 4 C. & P. 327; 2 B. & Ad. 925, S. C.; Ellis v. Saltau, 4 C. & P. 327, n. a; Ponsford v. Swaine, 1 Johns. & Hem. 433; Story, Eq. Pl. §§ 599, 824, 825, n.; 2 Story, Eq. Jur. §§ 1457, 1498; Anon., 3 Atk. 644.

<sup>6</sup> Martin v. Thornton, 4 Esp. 181, per Ld. Alvanley.

<sup>7</sup> D. of Buccleuch v. Met. Board of Works, 5 Law Rep., H. L. 418; 41 (3676)

respect to barristers, it has been held that they cannot be forced to prove what was stated by them on a motion before the court;<sup>1</sup> and the like privilege has been strenuously claimed, though not expressly recognised, where a counsel was called upon as a witness to disclose a confidential negotiation, into which, on behalf of his client, he had entered with a third party, though the client himself waived all objection to the course of examination proposed.<sup>2</sup>

§ 939.<sup>3</sup> A *fourth class* of cases, in which evidence is excluded ‡ 860 from motives of public policy, comprises *secrets of State*, or matters, the disclosure of which would be prejudicial to the public interest. These matters are such as concern the administration, either of penal justice, or of government; but the principle of public safety is in both cases the same, and the rule of exclusion is applied no further than the attainment of that object requires. Thus, in Crown prosecutions, and in informations for frauds committed against the revenue laws, witnesses for the Crown *will not*, on cross-examination, *be permitted to disclose* either the names of their employers, or the nature of the connexion between them, or the names of the person from whom they received information, or the names of those to whom they gave information, whether such last-mentioned persons were magistrates, or actually concerned in the executive administration, or were only the channel through which the communication was made to Government.<sup>4</sup> Neither can the witness be asked whether he himself was the informer.<sup>5</sup> “It is perfectly right,” said Lord Chief Justice Eyre, in Hardy’s case,<sup>6</sup> “that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally

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L. J., Ex. 137, per Dom. Proc., S. C.; 5 Law Rep., Ex. 221, per Ex. Ch.; 39 L. J., Ex. 130, S. C.; 3 Law Rep., Ex. 306; 37 L. J., Ex. 177, S. C.

<sup>1</sup> *Curry v. Walter*, 1 Esp. 456, per Eyre, C. J.

<sup>2</sup> *Baillie’s case*, 21 How. St. Tr. 358—361.

<sup>3</sup> Gr. Ev. § 250, in great part.

<sup>4</sup> *R. v. Watson*, 32 How. St. Tr. 100—103; 2 Stark. R. 135, S. C.; *R. v. Hardy*, 24 How. St. Tr. 753, 808—820; 1 Ph. Ev. 178—180.

<sup>5</sup> *Att.-Gen. v. Briant*, 15 M. & W. 169.

<sup>6</sup> 24 How. St. Tr. 808.

obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which the detection is made, should not be unnecessarily disclosed."

§ 940. The protection afforded by this rule will be equally § 861 upheld, though the witness, in his examination in chief, has admitted that suggestions have been made to him on the part of the Government;<sup>1</sup> and the doctrine has been even carried so far, that, where a witness, believing the views of certain parties to be dangerous to the State, had consulted a private friend as to what steps he should pursue, and the friend advised him to communicate the information to Government, a majority of the learned judges held that the name of his friend could not be disclosed.<sup>2</sup> They<sup>3</sup> were also, in the same case, unanimously of the opinion, that all questions tending to the discovery of the channels by which the information was given to the officers of justice, were, upon the general principle of public convenience, to be suppressed; that all persons in that situation were protected from the discovery; and that, if an objection were raised to the question, it was no more competent for the defendant to ask who had advised the witness to give information, than to ask to whom he had given it in consequence of that advice, or to put any other question respecting the channel of communication.<sup>4</sup> The witness, however, may still be asked,—though little practical advantage can be gained by putting such a question,—whether the person to whom the information was communicated was a magistrate or not.<sup>5</sup>

§ 941. It may well be doubted whether this rule of protection § 862 extends to ordinary prosecutions;<sup>6</sup> and even when it applies,—as

<sup>1</sup> *R. v. O'Connell*, Arm. & T. 178, 179. See, also, pp. 233, 240, of the same report, where the general doctrine was recognised and acted upon.

<sup>2</sup> *R. v. Hardy*, 24 How. St. Tr. 808—820, Eyre, C. J., Hotham, B., & Grose, J., pro: Macdonald, C. B., & Buller, J., con.

<sup>3</sup> Gr. Ev. § 250, in part.

<sup>4</sup> 24 How. St. Tr. 816, per Eyre, C. J.

<sup>5</sup> *Id.* 808.

<sup>6</sup> *Att.-Gen. v. Briant*, 15 M. & W. 181, per Pollock, C. B.; *R. v. Richardson*, 3 Fost. & Fin. 693, per Cockburn, C. J.

unquestionably it does whenever the Government is directly concerned,—it may sometimes, if rigidly enforced, be productive of great individual hardship; since, where a witness is giving an account of what occurred at a distant period, it is obviously material to ascertain whether he gave substantially the same account recently after the transaction; and if the object be to shake the credit of the witness, it is equally important to know whether a communication, which he asserts that he made to a certain person, was, in fact, ever so made. On the other hand, it is absolutely essential to the welfare of the State, that the names of parties who interpose in situations of this kind should not be divulged; for otherwise,—be it from fear, or shame, or the dislike of being publicly mixed up in inquiries of this nature,—few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that many great crimes would pass unpunished.<sup>1</sup>

§ 942.<sup>2</sup> The opinion which seems best supported by decided cases § 863 and dicta, is, that the *proceedings of grand jurors* should, on similar grounds of public policy, be regarded as privileged communications. Some persons imagine,—though it would seem erroneously,—that the preliminary inquiry as to the guilt or innocence of a party accused ought to be secretly conducted;<sup>3</sup> and, in furtherance of this object, every grand juror is sworn to secrecy. One reason may be, to prevent the escape of the party, should he know that proceedings were in train against him; another may be, to secure freedom of deliberation and opinion among the grand jurors, which might be impaired if the part taken by each could be made known to the accused or to the Crown; and although these reasons are clearly fallacious, since the first is answered by the fact, that most crimes are primarily investigated by an open inquiry before the committing magistrate, and the second rests on an assumption of pusillanimity and meanness, which the gentlemen who constitute

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<sup>1</sup> *Home v. Bentinck*, 2 B. & B. 162, per Dallas, C. J.; *U. S. v. Moses*, 4 Wash. 726.

<sup>2</sup> Gr. Ev. § 252, in part.

<sup>3</sup> In *R. v. Bullard*, 12 Cox, 353, Byles, J., observed, that “the grand jury were a secret tribunal, and not bound by any rules of evidence.”



the grand jury but little deserve; still, they are the best that can be furnished in support of a system, which is doubtless often productive of perjury, often of collusion, and sometimes of oppression.<sup>1</sup>

§ 943. The rule includes not only the grand jurors themselves, but their clerk,<sup>2</sup> if they have one, and the prosecuting officer,<sup>3</sup> if he be present at their deliberations; all these being equally concerned in the administration of the same portion of penal law. They are not permitted to disclose what number of jurors were present when a case was brought before them, or the number or names of the jurors who agreed or refused to find the bill of indictment;<sup>4</sup> neither can they be called on the trial to explain their finding,<sup>5</sup> or to detail the evidence on which the accusation was founded,<sup>6</sup> or to show that a witness has given testimony in court contrary to what he had sworn before them.<sup>7</sup> In an action, however, for a malicious indict-

<sup>1</sup> See observations on this subject, and on the general inutility of grand juries, in *Law Mag.* vol. xxxi. pp. 242—251.

<sup>2</sup> 12 *Vin. Abr.*, *Ev. B.* a. 5.

<sup>3</sup> So decided in *America*, *Com. v. Tilden*, cited in 2 *St. Ev.* 232, n. 1, by *Metcalf*; *M'Lellan v. Richardson*, 1 *Shepl.* 82.

<sup>4</sup> *R. v. Marsh*, 6 *A. & E.* 236. See 4 *Hawk. P. C.*, b. 2, c. 25, § 15. In *America*, grand jurors have been asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact; *M'Lellan v. Richardson*, 1 *Shepl.* 82; *Low's case*, 4 *Greenl.* 439; *Com. v. Smith*, 9 *Mass.* 107.

<sup>5</sup> *R. v. Cooke*, 8 *C. & P.* 584, per *Patteson*, J.

<sup>6</sup> See *R. v. Watson*, 32 *How. St. Tr.* 107, per *Ld. Ellenborough*, and 6 *A. & E.* 237, *arg.*; *Hindekoper v. Cotton*, 3 *Watts*, 56; *M'Lellan v. Richardson*, 1 *Shepl.* 82; *Low's case*, 4 *Greenl.* 439, 446, 453; *Burr's trial* [*Anon.*] *Ev. for def.*, p. 2.

<sup>7</sup> 12 *Vin. Abr. Ev. H.*; *Imlay v. Rogers*, 2 *Halst.* 347. *Mr. Chitty*, in his 1st vol. of *Crim. Law*, p. 322, states that perjury before the grand jury is indictable, and refers to his vol. on *Prec.*, which contains nothing on the subject. *Mr. Christian*, also, in a note to 4 *Bl. Com.* 126, narrates that, at *York*, a grand juror, hearing a witness swear in court contrary to the evidence which he had given before the grand jury, told the judge, "and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury." What became of this case does not appear. By the *N. York Cr. Code*, § 267, "Every member of the grand jury must keep secret, whatever he himself, or any other grand juror may have said, or in what manner he, or any other grand juror, may have voted on a matter before them." § 268. "A member of the grand jury may, however, be required by any court to disclose the testimony of a witness

ment, Lord Kenyon is reported to have allowed the plaintiff to call one of the grand jury, in order to prove that the defendant was the prosecutor,<sup>1</sup> and a similar course was pursued on another occasion without opposition.<sup>2</sup>

- § 944. In illustration of this subject it may be added, that the clerk of the Property Tax Commissioners has been held bound to produce in a court of justice his official books, and to answer all questions respecting the collection of the tax, though he had been sworn, on entering office, not to disclose anything he should learn in that capacity, without the consent of the Commissioners, or unless by force of some Act of Parliament.<sup>3</sup> § 863

§ 945.<sup>4</sup> On similar grounds of public policy, and for the protection of parties against fraud, the law excludes the testimony of *traverse* or *petty jurors*, when offered to prove *mistake* or *misbehaviour* by the jury in regard to the verdict. Thus, where a motion was made to amend the *postea* by increasing the damages, the court refused to admit an affidavit sworn by all the jurymen, in which they stated their intention to have been to give the plaintiff such increased sum.<sup>5</sup> So, also, on several occasions, affidavits that verdicts have been decided by lot have been rejected on motion for new trials, whether such affidavits were sworn by individual jurymen,<sup>6</sup> or by strangers, stating the subsequent admissions of jurors to themselves,<sup>7</sup> or even that a declaration had been made by one § 864

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examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor." This appears to be the common-sense view of the matter.

<sup>1</sup> Sykes v. Dunbar, 2 Selw. N. P. 1081.

<sup>2</sup> Freeman v. Arkell, 1 C. & P. 137, cor. Park, J.

<sup>3</sup> Lee v. Birrell, 3 Camp. 337, per Id. Ellenborough.

<sup>4</sup> Gr. Ev. § 252, in part.

<sup>5</sup> Jackson v. Williamson, 2 T. R. 281.

<sup>6</sup> Vasie v. Delaval, 1 T. R. 11; Owen v. Warburton, 1 N. R. 326; Heyes v. Hindle, per Q. B. in M. T., 1863, MS.; Little v. Larrabee, 2 Greenl. 37, 41, n.

<sup>7</sup> Straker v. Graham, 4 M. & W. 721; The State v. Freeman, 5 Conn. 348; Meade v. Smith, 16 Conn. 346.

juror in the hearing of his fellows in open court after the verdict had been pronounced.<sup>1</sup> In all cases of this kind, the court must obtain their knowledge of the misconduct complained of, either from the officer who had charge of the jury,<sup>2</sup> or from some other person who actually witnessed the transaction.<sup>3</sup> But, although a juryman's affidavit of what occurred in the jury-box during the trial cannot be received, it is admissible to explain the circumstances under which he came into the box.<sup>4</sup>

§ 946. On a like principle of public policy, no witness,—whether § 865  
he be a Peer, a Member of the House of Commons, an officer of either House, or a shorthand writer,—can be forced, without the permission of the House having been first obtained, to disclose in a court of justice what took place *within the walls of Parliament*, or to relate any expressions or arguments that may have been used by one of the members in the course of debate;<sup>5</sup> and although he may probably be asked as to the fact, whether or not a member spoke upon a particular subject of discussion,<sup>6</sup> he may decline to answer any question relating to the manner in which the votes were given on a division.<sup>7</sup>

§ 947.<sup>8</sup> On similar grounds, the official transactions between the § 886  
*heads of the departments of Government and their subordinate officers*, are, in general, treated as *secrets of State*.<sup>9</sup> Thus, communications between a colonial governor and his attorney-general, on the condition of the colony or the conduct of its officers,<sup>10</sup> or between such governor and a military officer under his authority;<sup>11</sup> the re-

<sup>1</sup> *Burgess v. Langley*, 5 M. & Gr. 722; *Raphael v. Bk. of England*, 17 Com. B. 161.

<sup>2</sup> 5 M. & Gr. 725, per Cresswell, J.

<sup>3</sup> *Vasie v. Delaval*, 1 T. R. 11, per Ld. Mansfield.

<sup>4</sup> *Bailey v. Macanley*, 13 Q. B. 815, 829.

<sup>5</sup> *Plunkett v. Cobbett*, 29 How. St. Tr. 71, 72; 5 Esp. 136, S. C., per Ld. Ellenborough; *Chubb v. Salomons*, 3 C. & Kir. 75, per Pollock, C. B.

<sup>6</sup> *Plunkett v. Cobbett*, 29 How. St. Tr. 71, 72; 5 Esp. 136, S. C.

<sup>7</sup> *Chubb v. Salomons*, 3 C. & Kir. 75.

<sup>8</sup> Gr. Ev. § 251, in great part.

<sup>9</sup> By the N. York Civ. Code, § 1710, r. 5, "a public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure."

<sup>10</sup> *Wyatt v. Gore*, Holt, N. P. R. 299.

<sup>11</sup> *Cooke v. Maxwell*, 2 Stark. R. 183.

port of a military commission of inquiry, made to the commander-in-chief; <sup>1</sup> the report of a collision at sea, made by the captain of one of the ships to the Lords Commissioners of the Admiralty; <sup>2</sup> the report submitted to the Lord Lieutenant of Ireland by an Inspector General of the prisons; <sup>3</sup> and the correspondence between an agent of the Government and a Secretary of State; <sup>4</sup> or between the Directors of the East India Company and the Board of Control, under the old law; <sup>5</sup> or between an officer of the Customs and the Board of Commissioners, <sup>6</sup>—are confidential and privileged matters, which the interest of the State will not permit to be revealed. The President of the United States, and the Governors of the several States, are not bound in America to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would, on public considerations, be inexpedient. <sup>7</sup> And the same doctrine, as it would seem, prevails in England, whenever Ministers of State are called as witnesses for the purpose of producing public documents. <sup>8</sup>

§ 948. If, however, the Minister, instead of attending personally § 866 at the trial, should send the required papers by the hands of a subordinate officer, the judge would probably examine them himself, and would compel their production, unless he were satisfied that they ought on public grounds to be withheld. <sup>9</sup> When the law is

<sup>1</sup> *Home v. Bentinck*, 2 B. & B. 130; 4 Moore, 563, S. C.; *Beatson v. Skene*, 29 L. J., Ex. 430; 5 H. & N. 838, S. C.; *Dawkins v. Ld. Rokeby*, 8 Law Rep., Q. B. 255, per Ex. Ch.; 42 L. J., Q. B. 63, S. C.

<sup>2</sup> *H. M. S. Bellerophon*, 44 L. J., Adm. 5.

<sup>3</sup> *M'Elveney v. Connellan*, 17 Ir. Law R., N. S. 55.

<sup>4</sup> *Anderson v. Hamilton*, 2 B. & B. 156, n.; 8 Price, 244, n.; and 4 Moore, 533, n. S. C.; 2 Stark. R. 185, per Ld. Ellenborough, cited by the Att.-Gen.; *Stace v. Griffith*, 6 Moo. P. C., N. S., 18; *Marbury v. Madison*, 1 Cranch, 144.

<sup>5</sup> *Smith v. E. India Co.*, 1 Phill. 50; *Rajah of Coorg v. East India Co.*, 25 L. J., Ch. 345; *Wadeer v. E. India Co.*, 8 De Gex, M. & G. 182.

<sup>6</sup> *Black v. Holmes*, Fox & Sm. 28.

<sup>7</sup> 1 Burr's trial, 186, 187, per Marshall, C. J.; *Gray v. Pentland*, 2 Serg. & R. 23.

<sup>8</sup> *Beatson v. Skene*, 29 L. J., Ex. 430; 5 H. & N. 838, S. C.

<sup>9</sup> *Id.*; *Dickson v. E. of Wilton*, 1 Fost. & Fin. 425, per Ld. Campbell. See, however, as to this last case, *Dawkins v. Ld. Rokeby*, 8 Law Rep., Q. B. 272, 273, per Kelly, C. J., pronouncing the judgment of the Ex. Ch.

restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.<sup>1</sup> It has, however, been held, that, in an action of trespass brought against the governor of a colony, a military officer under his control might be asked in general terms, whether he did not act by the direction of the defendant, though the written instructions could not be given in evidence.<sup>2</sup> But communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty; such, for example, as a letter by a private individual to the chief secretary of the postmaster-general, complaining of the conduct of the guard of the mail towards a passenger.<sup>3</sup>

§ 949.<sup>4</sup> The law excludes, on public grounds, a *fifth* species of <sup>§ 867</sup> evidence, namely, that which is *indecent*, or offensive to public morals, or *injurious to the feelings of third persons*; the parties themselves having no interest in the matter, except what they have impertinently created. The mere indecency of disclosures does not suffice to exclude them, where the evidence is *necessary* for the purpose of civil or criminal justice; as, on an indictment for a rape; or on a question upon the sex of one claiming an estate tail, as heir male or female; or upon the legitimacy of one claiming as lawful heir; or on a petition for dissolution of marriage, for judicial separation, or for damages on the ground of adultery.<sup>5</sup> In these and similar cases the evidence is necessary, either for the proof and punishment of crime, or for the vindication of rights existing before, or independent of, the fact sought to be disclosed. But where the parties have impertinently interested themselves in a question, tending to violate the peace of society by exhibiting an innocent third person in a ridiculous light, or to disturb his peace

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<sup>1</sup> Gray v. Pentland, 2 Serg. & R. 23, 31, 32, per Tilghman, C. J., cited with approbation in Yoter v. Sanno, 6 Watts, 166, per Gibson, C. J. See, also, Stace v. Griffith, 6 Moo. P. C., N. S. 18, and see ante, § 918.

<sup>2</sup> Cooke v. Maxwell, 2 Stark. R. 183, per Bayley, J.

<sup>3</sup> Blake v. Pilford, 1 M. & Rob. 198.

<sup>4</sup> Gr. Ev. § 253, almost verbatim.

<sup>5</sup> See 20 & 21 V., c. 85, §§ 16, 27, 33.

and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers<sup>1</sup> or contracts respecting the sex of a third person,<sup>2</sup> or upon the question whether an unmarried woman has had a child.<sup>3</sup>

§ 950. In like manner, when the legitimacy of a child is the question in dispute, the testimony of the parents, that they have or have not *had connexion*, has,—on the same grounds of decency, morality, and policy,—been, until recent times, uniformly rejected by the judges.<sup>4</sup> This rule,—which, it now seems,<sup>5</sup> has not been indirectly superseded, either by § 3 of the Act of 32 & 33 Vict. c. 68,<sup>6</sup> or by two modern decisions,<sup>7</sup> which were at one time supposed to have had that effect,—excludes not only all direct questions respecting access, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause;<sup>8</sup> and it applies to the depositions of the parents equally with their *viva voce* testimony.<sup>9</sup>

<sup>1</sup> No wager is now recoverable, 8 & 9 V., c. 109, § 18. See *Higginson v. Simpson*, 46 L. J., C. P. 192; *Diggle v. Higgs*, L. R., 2 Ex. D. 422; *Hampden v. Walsh*, L. R., 1 Q. B. D. 189; *Read v. Anderson*, L. R., 10 Q. B. D. 100; 52 L. J., Q. B. 214, S. C., per maj. in Ct. of App., 53 L. J., Q. B. 532; *Trimble v. Hill*, L. R., 5 App. Cas. 342, per Pr. C.; 49 L. J., Pr. C. 49, S. C.

<sup>2</sup> *Da Costa v. Jones*, 2 Cowp. 729.

<sup>3</sup> *Ditchburn v. Goldsmith*, 4 Camp. 152. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the court will not proceed at all in the trial. *Brown v. Leeson*, 2 H. Bl. 43; *Henkin v. Gerss*, 2 Camp. 408. But see *Hussey v. Crickett*, 3 Camp. 168.

<sup>4</sup> *Goodright v. Moss*, 2 Cowp. 594; *Legge v. Edmonds*, 25 L. J., Ch. 125; *Cope v. Cope*, 1 M. & Rob. 269, 272—274, per Alderson, B.; 5 C. & P. 604, S. C.; *Wright v. Holdgate*, 3 C. & Kir. 158, per Cresswell, J.; *R. v. Luffe*, 8 East, 193, 202, 203; *R. v. Rook*, 1 Wils. 340; *R. v. Reading*, Cas. temp. Hardw. 79; *R. v. Mansfield*, 1 Q. B. 444; 1 G. & D. 7 S. C.; *Anon. v. Anon.*, 22 Beav. 481; 23 Beav. 273, S. C., giving a more accurate note of the judgment; *Com. v. Shepherd*, 6 Binn. 283. See ante, § 649.

<sup>5</sup> *Guardians of Nottingham v. Tomkinson*, L. R., 4 C. P. D. 343; 48 L. J., M. C. 171, S. C.

<sup>6</sup> Cited post, § 1355.

<sup>7</sup> *In re Rideout's Trusts*, 10 Law Rep., Eq. 41; 39 L. J., Ch. 192, S. C.; *Re Yearwood's Trusts*, 46 L. J., Ch. 478, per Hall, V.-C.; L. R., 5 Ch. D. 545, S. C.

<sup>8</sup> *Wright v. Holdgate*, 3 C. & Kir. 158; *R. v. Sourton*, 5 A. & E. 180, 185, 188, 189. In this last case, with the view of proving non-access, the father was asked whether, at a particular time, he did not live 100 miles from his wife, and cohabit with her sister. Held, this question could not be put.

<sup>9</sup> *Goodright v. Moss*, 2 Cowp. 592, per Ld. Mansfield; *Cope v. Cope*, 1 M. & Rob. 272—274, per Alderson, B.; *Atchley v. Sprigg*, 3 New R. 360; 33 L. J., Ch. 345, S. C.; per Kindersley, V.-C., explaining *Plowes v. Bossey*, 31 L. J., Ch. 601; *Re R—'s Trusts*, 39 L. J., Ch. 192.

Neither is it affected by the circumstance, that, at the time of the examination of one of the parents, the other is dead; because the rule has been established, not simply on the ground that the tendency of such evidence is to promote connubial dissension, but on the broad basis of general public policy.<sup>1</sup> But this rule does not preclude the parents from proving that the supposed marriage was either invalid,<sup>2</sup> or valid,<sup>3</sup> or that their children were born before or after its celebration, though the effect of such evidence is, in the first and third case, to bastardize the issue, and, in the others, to establish its legitimacy.<sup>4</sup> For this purpose, too, their declarations or their old answers in Chancery are admissible evidence.<sup>5</sup>

§ 951. It is clear, also, that in a case of bastardy, a married woman may, when the fact of her husband's non-access has already been proved by independent evidence, confess her adulterous connexion with another person, and thus enable the justices, in the event of her testimony being corroborated in some material particular,<sup>6</sup> to make the order of maintenance.<sup>7</sup> But this exception to the general rule of exclusion is founded on necessity; since the fact, to which she is permitted to testify, is probably within her own knowledge and that of the adulterer alone.<sup>8</sup> It may here be added,—as the point has been considered worthy of discussion,—that in an action against a husband for the price of necessaries supplied to his wife while living alone, the wife is an admissible witness for the defendant to prove that she has committed adultery, and that, consequently, the defendant is not responsible for her maintenance.<sup>9</sup> Such evidence, though strictly legal, is of course open to comment, not only as coming from a polluted source, but as the possible result of collusion between the husband and the wife for the purpose of defeating the plaintiff's claim.<sup>10</sup>

<sup>1</sup> *R. v. Kea*, 11 East, 132.

<sup>2</sup> *In re Darcys*, 11 Ir. Law R., N. S. 298.

<sup>3</sup> *R. v. Bramley*, 6 T. R. 330; *Standen v. Standen*, Pea. R. 32.

<sup>4</sup> *Goodright v. Moss*, 2 Cowp. 591, and the cases referred to in *Ld. Mansfield's* judgment, 593, 594.

<sup>5</sup> *Id.*

<sup>6</sup> 35 & 36 V., c. 65, § 4; 36 V., c. 9, § 5; 8 & 9 V., c. 10, § 6.

<sup>7</sup> *R. v. Reading*, Cas. temp. Hardw. 79; 1 Bott, 432, S. C.; *Cope v. Cope*, 1 M. & Rob. 273, n. a; *Legge v. Edmonds*, 25 L. J., Ch. 125.

<sup>8</sup> *R. v. Luffe*, 8 East, 293, per *Ld. Ellenborough*.

<sup>9</sup> *Cooper v. Lloyd*, 6 Com. B., N. S. 519.

<sup>10</sup> *Id.* 525, per *Willes, J.*

## CHAPTER XVII.

## MATTERS NOT PROVABLE BY A SINGLE WITNESS.

§ 952.<sup>1</sup> UNDER this head it is not proposed to go into an ex- § 869  
tended consideration of the Statutes of Treason, but only to mention briefly some instances in which those Acts, and some other statutes and rules of law, have regulated particular cases, taking them out of the operation of the general principles, by which they would otherwise be governed. Thus, in regard to *treason* and *misprision of treason*, though by the common law these crimes were sufficiently proved by one credible witness,<sup>2</sup> it has been deemed expedient to enact, that no person shall be indicted, tried, or attainted thereof, but upon the oaths and testimony of *two lawful witnesses*, either both to the same overt act, or one to one and the other to another overt act of the same treason, unless the accused shall willingly without violence, in open court, confess the same;<sup>3</sup> and further, that if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason.<sup>4</sup>

§ 953. This protective rule,—which in England has remained § 870  
in its present state since the days of King William III., and in Ireland was adopted in the year 1821,—has been incorporated, with some slight variation, into the constitution of America,<sup>5</sup> and may

<sup>1</sup> Gr. Ev. § 255, in part.

<sup>2</sup> Post. C. L. 233; M'Nally, Ev. 31; R. v. Clare, 28 How. St. Tr. 887, 924; Woodbeck v. Keller, 6 Cowen, 120.

<sup>3</sup> As to the confession, see ante, § 866.

<sup>4</sup> 7 W. 3, c. 3, §§ 2, 4, extended to Ireland by 1 & 2 G. 4, c. 24.

<sup>5</sup> "No person shall be convicted of treason, unless on the testimony of *two witnesses to the same overt act*, or on confession in open court." Const. U. S. Art. 3, § 3; Laws U. S., vol. 2, ch. 36, § 1.

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be met with in the statutes of most, if not all, of the States in the Union. The first notice that we have of this rule, is in a repealed Act of the time of Henry VIII.,<sup>1</sup> and from the language there employed it appears probable, that the original reason for its adoption was that stated by Lord Nottingham on Lord Strafford's trial:—"Anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and, anciently, heresy was treason; and from thence the Parliament thought fit to appoint, that two witnesses ought to be for proof of high treason."<sup>2</sup>

§ 954. Its continuance in modern times may perhaps be ascribed, § 871 in part, to the obstinacy with which men cling to established forms of proceeding; in part, to the duty of allegiance, which may be supposed to counterpoise the information of a single witness;<sup>3</sup> and, in part, to the heinousness of the crime of treason, which raises a presumption of innocence in favour of the accused, while the counter-presumption, that on so serious a trial no witness would be guilty of criminative perjury is forgotten.<sup>4</sup> But, possibly, the best reason for the regulation is, that, on state trials, the prisoner has to contend against the whole power of the Crown; that this power is especially liable to abuse in times of excitement and danger; that the law of treason is ill-defined, and worse understood; and that the consequences of a conviction, both to the accused and to his family, were, until very recently,<sup>5</sup> savage and revolting.

§ 955. Notwithstanding the above rule, any *collateral* matter, § 872 not conducing to the proof of the overt acts, may be proved by the testimony of a single witness, by the extrajudicial confession of the prisoner, or by other evidence admissible at common law.<sup>6</sup>

<sup>1</sup> 25 H. 8, c. 14.

<sup>2</sup> T. Ray. 208.

<sup>3</sup> 4 Bl. Com. 358.

<sup>4</sup> 3 Benth. Ev. 391, 392.

<sup>5</sup> 33 & 34 V., c. 23, §§ 1, 31.

<sup>6</sup> Fost. C. L. 242; 1 East, P. C. 130.

For instance, on an indictment for treason in adhering to the Queen's enemies, the fact that the prisoner is a subject of the British Crown may be established by his admission, or by the testimony of one witness.<sup>1</sup>

§ 956.<sup>2</sup> In treason and misprision of treason, no evidence can § 873  
be given of any overt act which is not expressly laid in the indictment.<sup>3</sup> But the meaning of this rule is, not that the whole detail of facts shall be set forth, but that no overt act amounting to a *distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment, or unless it conduce to the proof of any of the overt acts, which are laid.<sup>4</sup> For instance, in *Layer's case*,<sup>5</sup> the prisoner's correspondence with the Pretender was allowed to be read in evidence, as tending directly to prove one overt act laid, namely, the conspiring to depose the King and to place the Pretender on the throne, though this correspondence was a substantive treason in itself,<sup>6</sup> and was not charged as an overt act in the indictment; and, on the same ground, the publication of the Pretender's manifesto by Mr. Deacon was read against him in 1746, as strongly proving with what intention he had joined the rebel army, and as supporting the overt act laid in the indictment of marching in a warlike manner to depose the King.<sup>7</sup> On the other hand, when Captain Vaughan was indicted for adhering to the King's enemies, and the overt act laid was his cruising on the King's subjects in the *Loyal Clancarty*, the court rejected evidence of his cruising in another vessel; as, if it were true, it would be no sort of proof of the act for which he was then to answer.<sup>8</sup>

<sup>1</sup> *R. v. Vaughan*, 15 How. St. Tr. 535, per Ld. Holt; *Fost. C. L.* 240, S. C.

<sup>2</sup> *Gr. Ev.* § 256, in part as to first six lines.

<sup>3</sup> 7 W. 3, c. 3, § 8. This sect. is not incorporated in the Irish Act of 1 & 2 G. 4, c. 24, but as the rule is also recognized at common law, this would seem to be immaterial.

<sup>4</sup> *Fost. C. L.* 245; 1 East, P. C. 121—123.

<sup>5</sup> 16 How. St. Tr. 220—223; *Fost. C. L.* 245, 246, S. C.

<sup>6</sup> By 13 W. 3, c. 3, § 2.

<sup>7</sup> *R. v. Deacon*, *Fost. C. L.* 9; 18 How. St. Tr. 366, S. C.; *R. v. Wedderburn*, *Fost. C. L.* 22; 18 How. St. Tr. 425, S. C.

<sup>8</sup> *R. v. Vaughan*, 15 How. St. Tr. 499, *Fost.*; *C. L.* 246, S. C.

§ 957.<sup>1</sup> This rule is not peculiar to trials for treason; though, § 874  
 in consequence of the oppressive character of some former prosecutions for that crime, it has been deemed expedient expressly to enact it in the later statutes of treason. It is nothing more than a particular application of the well-known doctrine, that the proof must correspond with the allegations, and be confined to the point in issue.<sup>2</sup> The issue in treason is, whether the prisoner committed that crime by doing one or more of the treasonable acts stated in the indictment; as in defamation the question is, whether the defendant injured the plaintiff by maliciously uttering any of the slanders laid in the statement of claim; and evidence of collateral facts is admitted or rejected on the like principle, in either case, according as it does or does not tend to establish the specific charge. Therefore the declarations of the prisoner, and seditious language used by him, are admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy in which he was engaged.<sup>3</sup> And in support of the overt act of treason in the county mentioned in the indictment, other acts of treason, though done in other counties, may be given in evidence; subject, however, to be ultimately rejected, if the overt act, in corroboration of which they are tendered, is not proved to have been done in the county as laid.<sup>4</sup>

§ 958. It remains to be noticed in connexion with this subject, § 875  
 that the protective provisions of the Statutes of Treason<sup>5</sup> do not apply to the particular class of treasons, which consists in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, where the overt act or acts alleged shall be the assassination of her Majesty, or any attempt to injure in any manner whatsoever her Royal person; or to the misprisions of any such treason; but in all the cases the accused shall be indicted, arraigned,

<sup>1</sup> Gr. Ev. § 256, in part.

<sup>2</sup> Ante, §§ 218, 296.

<sup>3</sup> R. v. Watson, 2 Stark. R. 132—135.

<sup>4</sup> R. v. Laver, 16 How. St. Tr. 164; R. v. Deacon, 18 id. 367; Fost. C. L. 9, 10, S. C.; R. v. Vane, 6 How. St. Tr. 123—129; 1 East, P. C. 125, 126.

<sup>5</sup> 7 A. c. 21; 7 W. 3, c. 3; 6 G. 3, c. 53, § 3.

tried and attainted, in the same manner, and according to the same course and order of trial, and *upon the like evidence*, as if he stood charged with murder; though upon conviction, judgment shall be given, and execution done, as in other cases of high treason.<sup>1</sup>

§ 959.<sup>2</sup> It seems to have been formerly thought, that, in proof of the crime of *perjury*, two witnesses were *necessary*;<sup>3</sup> but this strictness, if it was ever the law, has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.<sup>4</sup> The oath of the opposing witness, therefore, will not avail, unless it be corroborated by material and independent circumstances; for otherwise, there would be nothing more than the oath of one man against another, and the scale of evidence being thus in one sense balanced, it is considered that the jury could not safely convict.<sup>5</sup> So far the rule is founded on substantial justice.<sup>6</sup> But it is not precisely accurate to say, that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose.<sup>7</sup> Thus, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness.<sup>8</sup> Still, evidence confirmatory of the single

<sup>1</sup> 39 & 40 G. 3, c. 93; 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V., c. 51, § 1. § 2 of this last Act makes it a high misdemeanor to discharge or aim fire-arms, or throw or use any offensive matter or weapon, with intent to injure or alarm her Majesty.

<sup>2</sup> Gr. Ev. § 257, in part.

<sup>3</sup> This is said to have been the opinion of Ld. Tenterden; 3 St. Ev. 860, n. q.; R. v. Champney, 2 Lew. C. C. 259, per Coleridge, J.

<sup>4</sup> See R. v. Lee, cited 2 Russ. C. & M. 650.

<sup>5</sup> 4 Bl. Com. 358; R. v. Gaynor, 1 Craf. & D., C. C. 142; Jebb, C. C. 262, S. C.; R. v. Braithwaite, 8 Cox, 254, 444, per Watson, B., and Hill, J.; 1 Fost. & Fin. 638, S. C.

<sup>6</sup> R. v. Yates, C. & Marsh, 139, per Coleridge, J.

<sup>7</sup> R. v. Gardiner, 8 C. & P. 737, per Patteson, J.; 2 Moo. C. C. 95, S. C.; R. v. Shaw, L. & Cave, 579; 10 Cox, 66; 34 L. J., M. C. 169, S. C.

<sup>8</sup> R. v. Mayhew, 6 C. & P. 315, per Ld. Denman. See, also, R. v. Towey, 8 Cox, 328.

accusing witness in some slight particulars only, will not be sufficient to warrant a conviction;<sup>1</sup> but it must at least be strongly corroborative of his testimony;<sup>2</sup> or, to use the quaint but energetic language of Chief Justice Parker, "a strong and clear evidence, and more numerous than the evidence given for the defendant."<sup>3</sup>

§ 960.<sup>4</sup> When several assignments of perjury are included in the same indictment, it does not seem to be clearly settled, whether, in addition to the testimony of a single witness, corroborative proof must be given with respect to each; but the better opinion is that such proof is necessary; and *that* too, although all the perjuries assigned were committed at one time and place.<sup>5</sup> For instance, if a person, on putting in his schedule in the Bankruptcy Court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence.<sup>6</sup>

§ 961.<sup>7</sup> The principle, that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that *without any witness directly to disprove what is sworn, circumstances alone*, when they exist in a

<sup>1</sup> R. v. Yates, C. & Marsh. 139, per Coleridge, J.; R. v. Boulter, 2 Den. 396; 3 C. & Kir. 236, S. C.

<sup>2</sup> R. v. Champney, and R. v. Wigley, 2 Lew. C. C. 258, 259, n., per Coleridge, J.; Jorden v. Money, 5 H. of L. Cas. 231, 232, per Ld. Brougham; Woodbeck v. Keller, 6 Cowen, 118, 121, per Sutherland, J.

<sup>3</sup> R. v. Muscot, 10 Mod. 194. See The State v. Molier, 1 Dev. 263, 265; The State v. Hayward, 1 Nott & M'C. 547; Clark's Exors. v. Van Reimsdyk, 9 Cranch., 160. <sup>4</sup> Gr. Ev. § 257 a, nearly verbatim.

<sup>5</sup> R. v. Virrier, 12 A. & E. 324, per Ld. Denman. But see R. v. Hare, 13 Cox, 174.

<sup>6</sup> R. v. Parker, C. & Marsh. 639, 645—647, per Tindal, C. J. In R. v. Mudie, 1 M. & Rob. 128, 129, Ld. Tenterden, under similar circumstances, refused to stop the case, saying that if the defendant was convicted he might move for a new trial. He was, however, acquitted.

<sup>7</sup> Gr. Ev. § 258, in part.

documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America that a man may be convicted of perjury on documentary and circumstantial evidence alone,—*first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and *thirdly*, where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other writings, which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.<sup>1</sup>

§ 962.<sup>2</sup> If the evidence adduced in proof of the crime of perjury § 879 consists of *two opposing statements by the prisoner*, and nothing more, he cannot be convicted. For if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that the declaration was the truth, and the other an error, or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances against him.<sup>3</sup> And if both the contradictory statements were delivered under oath, there is still nothing to show

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<sup>1</sup> U. S. v. Wood, 14 Pet. 430, 440—442. In this case, under the latter head of the rule here stated, it was held that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury in taking, at the custom-house in New York, the "owner's oath in cases where goods, wares, or merchandise have been actually purchased," upon the evidence of the invoice-book of his father, John Wood, of Saddleworth, Eng., and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the Government of the United States, by invoicing and entering the goods shipped at less than their actual cost. The whole of this case deserves an attentive perusal.

<sup>2</sup> Gr. Ev. § 259, in great part.

<sup>3</sup> See Alison, Cr. L. 481.

which of them is false, when no other evidence of the falsity is given.<sup>1</sup> If, indeed, it can be shown that, before making the statement on which perjury is assigned, the accused had been *tampered with*,<sup>2</sup> or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained;<sup>3</sup> and provided the nature of the statements was such, that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that because a man has given contradictory accounts of a transaction on two occasions, he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time.<sup>4</sup> Moreover, when a man

<sup>1</sup> *R. v. Wheatland*, 8 C. & P. 238, 241, per Gurney, B.; *R. v. Gaynor*, 1 *Crawf. & D.*, C. C. 142; *Jebb*, C. C. 262, S. C., *R. v. Harris*, 5 B. & A. 926.

<sup>2</sup> *Anon.*, per Yates, J., *Ld. Mansfield*, *Wilmot and Aston*, Js., concurring; 5 B. & A. 939, 940, n. See the observations of Mr. Greaves on this case, in 2 *Russ. C. & M.* 653, n.

<sup>3</sup> *R. v. Knill*, 5 B. & A. 929, 930, n.; *R. v. Hook*, *Dear. & Bell*, 606; 8 *Cox*, 5, S. C.

<sup>4</sup> Per *Holroyd, J.*, in *R. v. Jackson*, 1 *Lew. C. C.* 270. This very reasonable doctrine is in perfect accordance with the rule of the *Crim. Law of Scotland*, as laid down by Mr. Alison, in his excellent treatise on that subject, in the following terms:—"When contradictory and inconsistent oaths have been emitted, the mere contradiction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded, that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognised; but it is now justly considered indispensable that the perjury should be specified as existing in one, and the other deposition referred to *in modum probationis*, to make out, along with other circumstances, where the truth really lay." See *Alison*, *Cr. L.* 478.

merely swears to the best of his *memory and belief*, it of course requires very strong proof to show that he is wilfully perjured.<sup>1</sup>

§ 963. The rule requiring something more than the testimony § 880 of a single witness on indictments for perjury, is confined to the proof of the *falsity* of the matter on which the perjury is assigned. Therefore, the holding of the court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient, were the prisoner charged with any other offence.<sup>2</sup> Moreover, when several facts must be proved to make out an assignment of perjury, each of these facts may, in strict law, be established by the uncontroverted testimony of a single witness. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the assignment of perjury.<sup>3</sup>

§ 964. In cases of *bastardy*, a man cannot be adjudged to be the § 881 putative father of an illegitimate child on the single testimony of the mother; but before an order of affiliation can be made by the petty sessions,<sup>4</sup> or confirmed by the quarter sessions,<sup>5</sup> the mother must not only be a witness,<sup>6</sup> but her evidence must be corroborated,<sup>7</sup> *in some material particular*, by other testimony, to the satisfaction of the justices; and the order will be bad, if it does not allege that the confirmatory evidence was material.<sup>8</sup> This rule has been wisely established, in order to protect men from accusations which profligate, designing, and interested women might easily make, and which,

<sup>1</sup> Per Tindal, C. J., in *R. v. Parker*, C. & Marsh. 645.

<sup>2</sup> 2 Russ. C. & M. 654; 2 Hawk., P. C. c. 46, § 10.

<sup>3</sup> *R. v. Roberts*, 2 C. & Kir. 614, per Patteson, J.

<sup>4</sup> 35 & 36 V., c. 65, § 4; 36 V., c. 9, § 5.

<sup>5</sup> 8 & 9 V., c. 10, § 6.

<sup>6</sup> *R. v. Armitage*, 7 Law Rep., Q. B. 773; 42 L. J., M. C. 15, S. C.

<sup>7</sup> See *Hodges v. Bennett*, 5 H. & N. 625; 29 L. J., M. C. 224, S. C.

<sup>8</sup> *R. v. Read*, 9 A. & E. 619; 1 P. & D. 413, S. C.



however false, it might be extremely difficult to disprove. Still, the rule must not be strained so as to render corroboration necessary with respect to the actual begetting of the child, but it will suffice if any evidence be forthcoming calculated to raise a probability that illicit intercourse may have taken place, as, for example, proof of acts of familiarity between the mother and the putative father, though these may have occurred long prior to the date when the child was begotten.<sup>1</sup>

§ 964A. In actions for breach of promise of marriage the plaintiff, though now an admissible witness, cannot recover a verdict on his or her uncorroborated testimony, but some other *material* evidence in support of the promise must be forthcoming.<sup>2</sup> Again, no order for the removal of a pauper, in respect of a settlement acquired by three years residence in a parish, can be made "upon the evidence of the person to be removed, without such corroboration as the justices or court *may think sufficient*."<sup>3</sup>

§ 965. On several occasions it has been asserted in more or less authoritative language, that the Chancery Division of the High Court *cannot* act on the unsupported testimony of any person in his own favour.<sup>4</sup> Were this doctrine, however, submitted to the Court of last resort, it would probably not be upheld in its integrity;<sup>5</sup> though cases may sometimes occur,—as, for example, if a verbal promise by a deceased person were sought to be established by the uncorroborated statement of the promisee,—in which a judge would undoubtedly be justified in refusing to pronounce a decree without additional evidence.<sup>6</sup> In the recent case of *Finch v. Finch*,<sup>7</sup> the

<sup>1</sup> *Cole v. Manning*, 46 L. J., M. C. 175; L. R., 2 Q. B. D. 611, S. C.

<sup>2</sup> 32 & 33 V., c. 68, § 2. See *Hickey v. Campion*, I. R., 6 C. L. 557; *Bessela v. Stern*, L. R., 2 C. P. D. 265, per Ct. of App.; 46 L. J., C. P. 467, S. C.

<sup>3</sup> 39 & 40 V., c. 61, § 34; *R. v. Abergavenny Union*, L. R., 6 Q. B. D. 31; 50 L. J., M. C. 1, S. C.

<sup>4</sup> *Down v. Ellis*, 35 Beav. 578; *Grant v. Grant*, 34 Beav. 623; *Nunn v. Fabian*, 35 L. J., Ch. 140; *Hartford v. Power*, I. R., 3 Eq. 602.

<sup>5</sup> See U. falsely called *J. v. J.*, 1 Law Rep., P. & D. 461.

<sup>6</sup> *Rogers v. Powell*, 38 L. J., Ch. 648, per James, V.-C.; *Hartford v. Power*, I. R., 3 Eq. 602.

<sup>7</sup> L. R. 23 Ch. D. 267.

exception just referred to was recognised by the Court of Appeal as a practice which ought still to prevail when judges sat as jurymen to determine facts, and the Court held at the same time that the rule was applicable to cases of debts as well as to cases of gifts. Sir George Jessel, however, with characteristic accuracy, guarded and limited his decision by distinctly pointing out, that the rule was one of mere practice, and not of strict law.<sup>1</sup>

§ 966. In the *Ecclesiastical Courts* the testimony of a single witness, though omni exceptione major, is insufficient to support a decree, when such testimony stands unsupported by what the civilians pedantically call "adminicular circumstances."<sup>2</sup> This doctrine was in former days productive of much injustice,<sup>3</sup> but it is now of little practical importance, as the spiritual courts have, by a series of legislative improvements, been shorn of their jurisdiction,—first, over suits for defamation,<sup>4</sup>—then, over suits for brawling,<sup>5</sup>—next, in relation to the grant and revocation of probates of wills and letters of administration, and to all matters and causes testamentary,<sup>6</sup>—and lastly, in respect of divorces a mensa et thoro, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and, indeed, all causes, writs, and matters matrimonial.<sup>7</sup> In the Probate and Divorce Division of the High Courts, whether for England or Ireland, the rules of evidence observed in the old superior Courts of Common Law are applied to the trial of all questions of fact.<sup>8</sup> It seems, however, that in prosecutions under the Church Discipline Act,<sup>9</sup> the Court of Arches will still be guided by the old ecclesiastical rules as to evidence, and

<sup>1</sup> L. R. 23 Ch. D. 271.

<sup>2</sup> *Donellan v. Donellan*, 2 Hagg. Ec. R. 144 (Suppl.); *Simmonds v. Simmonds*, 5 Ec. & Mar. Cas. 324, 340—347, per Dr. Lushington; id. 6 Ec. & Mar. Cas. 578, per Sir H. Fust; *Crompton v. Butler*, 1 Cons. R. 460; *Hutchins v. Denziloe*, 1 Cons. R. 181, 182.

<sup>3</sup> See cases cited and discussed in 2nd ed. of this work, §§ 883—886.

<sup>4</sup> 18 & 19 V., c. 41, as to England; 23 & 24 V., c. 32, as to Ireland.

<sup>5</sup> 23 & 24 V., c. 32, both in England and Ireland.

<sup>6</sup> 20 & 21 V., c. 77, § 3; 20 & 21 V., c. 79, § 5, Ir.

<sup>7</sup> 20 & 21 V., c. 85, § 2.

<sup>8</sup> 20 & 21 V., c. 77, § 33; 20 & 21 V., c. 79, § 38, Ir.; 20 & 21 V. c. 85, § 48; 34 & 35 V., c. 49, § 8, Ir.

<sup>9</sup> 3 & 4 V., c. 86.

will require the testimony of a single witness to be corroborated at least to a certain extent.<sup>1</sup>

§ 967. It remains only to mention the case of *accomplices*, who are usually interested,<sup>2</sup> and always infamous, witnesses, and whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice. The *degree of credit*, which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists on the subject; and the jury may, if they please, act upon the evidence of the accomplice, even in a capital case, without any confirmation of his statement.<sup>4</sup> It is true that judges, in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review,<sup>5</sup> its omission will, in most cases, be deemed a neglect of duty on the part of a judge.<sup>6</sup> Considering, too, the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice.<sup>7</sup> The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but they only advise them not to give credit to the testimony.

<sup>1</sup> *Berney v. Bp. of Norwich*, 36 L. J., Ec. C. 10, per Pr. C. This case seems to overrule *Burder v. O'Neill*, 2 New R. 551.

<sup>2</sup> It used to be "a popular saying, that they fished for prey, like tame cormorants, with ropes round their necks." Macaulay's *History of Engl.*, vol. 1, ch. 5, p. 666.

<sup>3</sup> Gr. Ev. § 380, in great part.

<sup>4</sup> *R. v. Stubbs*, 25 L. J., M. C. 16; *Pearce & D.* 555, S. C.; *R. v. Hastings*, 7 C. & P. 152, per Ld. Denman; *R. v. Jones*, 2 Camp. 132, per Ld. Ellenborough; 31 How. St. Tr. 315, S. C.; *R. v. Atwood*, 1 Lea. 464; *R. v. Durham*, id. 478; *R. v. Dawber*, 3 Stark. R. 34; *R. v. Sheehan, Jebb*, C. C. 54; *R. v. Jarvis*, 2 M. & Rob. 40.

<sup>5</sup> *R. v. Boyes*, 30 L. J., Q. B. 302; 1 B. & S. 311, S. C.

<sup>6</sup> *R. v. Barnard*, 1 C. & P. 88; *R. v. Wilkes*, 7 C. & P. 273.

<sup>7</sup> *R. v. Gallagher*; 15 Cox, 289, 318.

§ 968. It has been stated, that this practice is not applicable to § 888 cases of *misdeemeanor*;<sup>1</sup> but there appears to be no foundation, either in reason or law, for such a distinction between misdemeanors and felonies; and, in fact, the distinction, if it ever existed, no longer prevails.<sup>2</sup> Still, the extent of corroboration will of course depend much upon the nature of the crime,<sup>3</sup> and the degree of moral guilt attached to its commission; and if the offence be one of a purely legal character, as for instance, the non-repair of a highway,—or if it imply no great moral delinquency, as the fact of having been present at a prize-fight,<sup>4</sup> which unfortunately terminated in manslaughter,<sup>5</sup>—the parties concerned, though in the eye of the law criminal, will not be considered such accomplices as to render necessary any confirmation of their evidence. Neither, in actions to recover penalties, does the law apprehend any danger from the mere fact of jurors being left, without any special caution from the bench, to weigh the uncorroborated testimony of an accomplice.<sup>6</sup>

§ 969.<sup>7</sup> But although on criminal trials it is the settled practice § 889 to require other evidence in corroboration of that of an accomplice; yet the *manner and extent of the corroboration* required are not so clearly defined. Some judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others have been satisfied with confirmatory evidence as to the *corpus delicti* only; but others, with more reason, have thought it essential that corroborative proof should be given of the *prisoner* having actually participated in the offence; and, when several prisoners are tried, that confirmation should be required as to all of them, before all can be safely convicted.<sup>8</sup> This last is undoubtedly now the prevailing opinion; the confirmation of the witness, as to the com-

<sup>1</sup> Per Gibbs, Att.-Gen. arg. in *R. v. Jones*, 31 How. St. Tr. 315.

<sup>2</sup> *R. v. Farler*, 8 C. & P. 106.

<sup>3</sup> *R. v. Jarvis*, 2 M. & Rob. 40, 52, per Gurney, B. See *R. v. Cramp*, 14 Cox, 390, where the prisoner was charged with attempting to produce abortion, and the woman was called as a witness.

<sup>4</sup> See *R. v. Coney*, L. R., 8 Q. B. D. 534; 51 L. J., M. C. 66, S. C.; and 15 Cox, 46.

<sup>5</sup> *R. v. Hargrave*, 5 C. & P. 170, per Patteson, J.; *R. v. Young*, 10 Cox, 371.

<sup>6</sup> *M'Clory v. Wright*, 10 Ir. Law R., N. S. 514, 519, per Keogh, J.; *Magee v. Mark*, 11 id. 449.

<sup>7</sup> Gr. Ev. § 381, in great part.

<sup>8</sup> *R. v. Stubbs*, 25 L. J., M. C. 16; *Pearce & D.* 555, S. C.

mission of the crime, being considered no confirmation at all, as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely, but on the contrary every motive to declare the truth, if he wishes to be believed when he shall afterwards endeavour to fix the crime upon the prisoner.<sup>1</sup>

§ 970. This doctrine has been well explained by the late Lord Abinger. "It is a practice," said his lordship, in a case of night-poaching,<sup>2</sup> "which deserves all the reverence of the law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects *the identity of the party accused*. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it. \* \* \* The danger is, that when a man is fixed, and knows that his own guilt is detected, he will purchase impunity by falsely accusing others." If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if they were but one.<sup>3</sup> The testimony, too, of the wife of an accomplice will not be considered corroborative of the evidence of her husband.<sup>4</sup>

§ 971.<sup>5</sup> To one class of persons, *apparently accomplices*, the rule § 891

<sup>1</sup> R. v. Farler, 8 C. & P. 106, per Ld. Abinger; R. v. Wilkes, 7 C. & P. 272, per Alderson, B.; R. v. Moores, id. 270; R. v. Addis, 6 C. & P. 388, per Patteson, J.; R. v. Wells, M. & M. 328, per Littledale, J.; R. v. Sheehan, Jebb, C. C. 54; R. v. Carey, id. 203. <sup>2</sup> R. v. Farler, 8 C. & P. 107, 108.

<sup>3</sup> R. v. Noakes, 5 C. & P. 328, per Littledale, J.; R. v. Magill, Ir. Cir. R. 418, per Perrin, J. <sup>4</sup> R. v. Neal, 7 C. & P. 168, per Park, J.

<sup>5</sup> Gr. Ev. § 382, almost verbatim.

requiring corroborative evidence does not apply; namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction. The early disclosure is considered as binding the party to his duty; and though a great degree of disfavour may attach to him for the part he has acted as an *informer*,<sup>1</sup> yet his case is not treated as that of an accomplice.<sup>2</sup>

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<sup>1</sup> *Valore*.

“But these are called Informers; men that live  
By treason, as Rat catchers do by poison.”

Beaumont's “Woman Hater,” Act V., Sc. 2.

<sup>2</sup> *R. v. Despard*, 28 How. St. Tr. 489, per Ld. Ellenborough.

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